In The

Supreme Court of the United States

October Term, 1976

No. 76-1415

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousmen and Helpers of America ("Local 814" or the "Union") respectfully prays that a writ of certiorari issue to review the decision and supplemental decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding.

OPINIONS BELOW

The original Decision and Order of the National Labor Relations Board in this proceeding is reported at 208 NLRB 184 (1974) and set out in the Appendix included with this petition (App. 1a). The initial

decision of the United States Court of Appeals for the District of Columbia Circuit (Tamm and Robb, Circuit Judges; Bazelon, Chief Judge, dissenting in part and concurring in part) denying enforcement and remanding the record, is reported at 167 App. D.C. 387, 512 F.2d 564 (1975) and set out at App. 1b. The Supplemental Decision and Order of the Board is reported at 223 NLRB No. 121 (1976) and set out at App. 1c. The Supplemental Opinion of the Court of Appeals (Bazelon, Chief Judge, dissenting) is unofficially reported at 93 LRRM 2305 and 2800 (1976) and is set out at App. 1d. The initial decisions of the Board and Court of Appeals will sometimes be referred to herein as "Santini I"; the decisions following remand will sometimes be identified as "Santini II."

JURISDICTION

The decision of the Court of Appeals enforcing the order of the Board herein was dated September 17, 1976; the judgment was entered on November 9, 1976. The order of the Court of Appeals denying the Union's petition for rehearing was entered on January 13, 1977 (App. 1e). This Court has jurisdiction to review the judgment in question by writ of certiorari under 29 U.S.C. §160(e) and (f) and 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals clearly err in enforcing the Board's findings that long-haul drivers engaged by an authorized household moving company were independent contractors, where the drivers, although owning their tractors, lease them to the carrier's exclusive use, utilize carrier-owned trailers, are an integral part of the carrier's household moving business, have little control over their own earnings, and are subject to the carrier's control and right of control over the manner and means of carrying out their work?

2. Did the Court of Appeals clearly err in enforcing the Board's order in this case in light of the conflict between the Board's finding that long haul owner-drivers in this case are independent contractors and the finding in a related case involving essentially the same circumstances that the owner-drivers in that case were employees?

3. Did the Court clearly err in enforcing the Board's order where the Board has failed to give the question of employee status for owner-drivers a "hard look" and has created a "doctrinal quicksand" without consistent standards for decision?

4. Did the Court erroneously affirm the Board's finding that a work preservation clause in the applicable collective bargaining agreement constituted an unlawful union signatory clause?

STATUTES

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 et seq.) are set forth at App. 1f.

STATEMENT

a. Parties

The Union represents local and long distance drivers, warehousemen and helpers employed in the Moving and Storage Industry of New York, New York (the "Industry"), an area-wide multi-employer bargaining association. Respondent Santini Brothers, Inc. ("Santini" or the "company") is an employer member of the Industry and a party to the Industry-wide collective bargaining agreement (the "Contract") with the Union.

b. Santini's Operations

This case raises critical issues concerning the employment status of long distance moving drivers engaged by employers within the Industry and the efforts of the Union to preserve for the collective bargaining unit the work of long distance driving within the Industry.

Santini engages in the business of local, commercial and household moving and long distance household moving. Santini's local moving operation is conducted by drivers who are members of Local 814, and who operate company-owned trucks, truck tractors, and trailers. Until the early 1960's the company's long distance household operation was similarly conducted through employees represented by

the Union, in company-owned vehicles. At that time, Santini, joining a number of other carriers within the Industry, commenced replacing bargaining unit drivers in long distance work by "owner-operators", also known as "contract drivers." By the late 1960's Santini completed the replacement process and operated its long distance moving entirely through a crew of approximately twenty-four owner-drivers. It is the Union's position that the owner-drivers in Santini's service are clearly employees within the meaning of Section 2(3) of the Act (App. 1f), and that the Board's contrary finding was inconsistent with Supreme Court and Board precedent.

c. Santini's Long-Haul Operation

The details of Santini's long-haul operation utilizing owner-drivers are spelled out in the opinions of Chief Judge Bazelon, dissenting in part and concurring in part in Santini I (App.12b); the opinion of Board Members Fanning and Jenkins, dissenting in Santini II (App. 8c), and the findings of the Administrative Law Judge below (App.29a). The following is a brief description of the germane aspects:

1. Ownership of Tractors. Santini's long-haul drivers haul goods in tractor-trailer units. The drivers are owners of tractors but not the trailers; they are required to lease the tractors to exclusively Santini and the driver has no right to use it on jobs other than with Santini (App. 13b and 13b, n.6). Both tractors and trailers are painted with the name and colors of Santini or its contract associate, United Van Lines, Inc. ("United"). Goods are hauled only under Santini or United bills of

lading. "The 24 drivers who constitute Santini's long-haul household movers operate under identical agreements whose terms and conditions are prescribed by Santini." (App. 11c). Santini may terminate the lease on thirty days' notice.

2. Compensation. Santini on its own authority and as a representative of United makes contracts with shippers to transport goods in interstate commerce; the long-haul drivers do not participate in generating business. The charge for the move is established by ICC rates; the drivers receive a percentage of the charge as established by Santini depending on the type of delivery. (App. 13b). Under the older forms of leases between Santini and the drivers, some of which were still in effect during this proceeding, the "owner-operator was subject to termination for driving for another carrier." (App. 13b, n.6). Under newer agreements covering some drivers, the owner-driver "is required to operate his own vehicle and is also required to notify Santini of any carrier business [he] discovers and to permit Santini to have the right of first refusal..." (Ibid.).

3. Costs of Operation.

Out of their commissions drivers pay the expenses of loading and unloading, including compensation for helpers, tractor maintenance, and fuel. Santini pays for license plates in operating states outside the driver's base state, and for public liability and property damage insurance on the operation of the combined tractor-trailer. "Over 90 percent of Santini's household moving is carried out on a C.O.D. basis and the driver

is required at destination to collect payment from the shipper and promptly account for payments to the carrier." (App. 11c). Santini requires drivers to carry liability and damage insurance on the operation of the unhooked tractor. (App. 39a). Santini assumes most of the liability for damages to goods in transit except for breakage of fragile items negligently packed or unpacked. (App. 39a).

4. Control Over the Operation.

Regulations of the ICC and Department of Transportation require Santini to strictly control the operation of vehicles in their service regardless of ownership. 49 CFR 1057.4(a) permits an authorized carrier to perform transportation with equipment he does not own, provided that the lease for use of the equipment

> "[s]hall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except [in circumstances not relevant here]."

The applicable regulations further require Santini to exercise control over details of the operations. The regulations,

> "consisting of nearly 100 pages, strictly circumscribe nearly every phase of their work, including maintenance

of equipment, hours of service, observance of safety standards, and the keeping of detailed records." Local 814, I.B.T. (Molloy Bros. Moving and Storage, Inc.), 208 NLRB 276, 278 (1974).

Shipments are inspected, estimated, written up, and arranged for the pickup date by employees of Santini without driver participation. (App. 11c). The driver arranges for packing, loading, and unloading. (App. 36a, 37a). The driver generally selects routes but delivery time is established by Santini. (App. 14b). Drivers may be suspended or terminated when Santini or United are dissatisfied with their performance. (App. 41a, 42a). It is apparent that United Van Lines through Santini has the right to control the manner and means of performing the operation when the drivers are operating on United shipments. (App. 15b, n.7).

d. The Union's Effort to Preserve Long Distance Driving Work In the Industry.

With the advent of owner-drivers, the Industry members generally took the position that the owner-drivers were independent contractors rather than employees covered by the Local 814 Contract. In the 1968 collective bargaining negotiations between the Union and Industry, including Santini, Local 814 sought unsuccessfully to obtain a contract clause which would preserve long distance driving work for the bargaining unit. In 1972 the Union and Industry negotiated a new clause in the

Contract Article 24, which provides in part:

"Article 24-Contract Employees
A.1. All persons performing long distance driving under contract to an employer covered by this agreement (whether as 'owner-operator,' 'owner-driver,' 'percentage driver,' 'commission driver,' or otherwise) shall be covered by this agreement as employees (hereinafter referred to as contract employees).

"2. Contract employees shall be covered by this contract limited to those provisions set forth in this section and including the Union Security, Pension and Welfare provisions, Legal Separability, No-Strike, Grievance and Arbitration clauses and Union Check-Off.

***

"4. The employer specifically reserves the right, consistent with its Agency Van Line Agreement, to control the manner and means and details of and by which contract employees perform services as well as the ends to be accomplished. All other details and economic arrangements shall be the subject of a contract between the owner of the vehicle and the employer party to this agreement provided that they shall not conflict with the provisions

of this article 24.***" (App. 22a-24a).

In the summer and fall of 1972 the Union sought to enforce Article 24 of the Contract with respect to Santini's long haul drivers. A charge was filed with the Board on behalf of three owner-drivers, and a complaint issued against the Union and Santini in January 1973. The complaint alleged that Article 24 violated Section 8(e) of the Act, the so-called hot-cargo provisions, and that the Union's efforts to enforce the clause violated Section 8(b)(4) of the Act - the "secondary boycott" provisions. The theory of the complaint was that Article 24 did not constitute a permissible "work preservation" or "recapture" clause, or an attempt to apply union standards to long distance driving, but constituted an effort to require "independent contractors" to become members of Local 814.

At approximately the same time a complaint was issued against the Union in an adjacent Regional Office of the Board, involving the Union's efforts to enforce Article 24 with respect to the owner-drivers in the service of another member of the New York City Industry - Molloy Brothers Moving and Storage, Inc. ("Molloy"). The Molloy complaint similarly alleged violations of Sections 8(e) and 8(b)(4) of the Act.

e. Board Proceedings.

The Santini complaint was referred to Administrative Law Judge Herzel Plaine. Molloy was referred to ALJ Sidney Sherman. Following separate trials in the two actions,

Judge Sherman in the Molloy case found that the long distance owner-drivers in the service of Molloy were employees within the meaning of the Act, rather than independent contractors, and recommended dismissal of the complaint. Local 814, I.B.T. (Molloy Bros. Moving and Storage, Inc.), 208 NLRB 276 (1974). Shortly thereafter, Judge Plaine in the Santini proceeding found that the owner-drivers in the service of Santini were independent contractors and that Article 24 was not a lawful work preservation clause. (App. 82a).

Both cases were brought to the Board for review. On January 8, 1974, a Board panel consisting of Chairman Miller, and Members Kennedy and Penello, affirmed Judge Plaine's findings and conclusions, without comment. The next day, a Board panel consisting of Miller, Penello and Member Fanning adopted without comment the findings and conclusions of Judge Sherman in Molloy. 208 NLRB 276 (1974).

f. Court of Appeals Proceedings.

The Union petitioned for review of the Santini decision and the Board cross-applied for enforcement; no petition was filed in Molloy. In April 1975 the Court of Appeals denied enforcement in Santini and remanded the record to the Board on the question of the independent contractor status of Santini's owner-drivers. (App. 9b). On this issue the Court found that the twin decisions of the Board in Santini and Molloy were "factually similar and ostensibly inconsistent"; "[b]ecause the Board has not explained its reasons for reaching different results,"

the Court ordered the record remanded "for clarification." (App. 8b). The Court added,

> "If the Board finds the two indistinguishable, it should so inform the Court." Ibid.

Opinion of Chief Judge Bazelon. In his separate opinion, Chief Judge Bazelon agreed that there was "no apparent distinction between Molloy and the case sub judice" and that the two decisions were "conflicting." (App. 19b, 22b). He added,

> "[T]he extent of Molloy's right of control was no larger than Santini's and both extended well beyond the requirements of government regulation through use of drivers' manuals." (App. 19b-20b).

Chief Judge Bazelon concluded however that the defects in the Board's decision were broader than the conflict between Santini and Molloy. He observed that this conflict existed against a "background of barely reconcilable precedents and of a failure of the Labor Board to provide a reasoned basis for its decisions regarding the definition of 'employee.'" (App. 22b). He further noted,

> "This case in my view presents a classic example of where a diligent reviewing court could determine through a variety of factors that the agency had not given the problem a 'hard look.'" (App. 23b).

Cautioning that in this context a "remand of the record alone can produce only a post hoc rationalization of the inconsistency between Molloy and this case," Chief Judge Bazelon concluded that the Board should be reversed and the case remanded "for a thorough reconsideration of the doctrinal quicksand in this area." (App. 24b).

g. Board Proceedings on Remand.

In April 1976, nearly a year after the Court's remand order, the Board* issued a Supplemental Decision and Order which affirmed the original Santini decision by a three/two majority (App. 1c), on the basis of a short list of asserted fact differences between Molloy and Santini. The Board refused to engage in discussion of the standards for determining employee status, stating that they were "well settled and need not be debated." (App. 7c, n.9).

*Unlike the original Santini decision, the remand was processed by the full Board membership. However, two of the three members of the original Board panel - Chairman Miller and Member Kennedy - were no longer on the Board at the decision on remand. The Board majority on the second decision consisted of Chairman Murphy and Members Penello and Walther; Members Fanning and Jenkins dissented.

In their dissenting opinion, Members Fanning and Jenkins found:

> "In our view, the basic and significant aspects of the relationship between the carriers and the long-haul drivers are identical in both Molloy and Santini. The differences in control relied upon by the majority, if they exist, are too inconsequential to warrant the conclusion that the long-haul drivers are employees in Molloy and independent contractors in Santini." (App.8c-9c).

h. Supplemental Court of Appeals Proceedings.

In proceedings subsequent to remand; the Court of Appeals (Tamm and Robb, Circuit Judges; Bazelon, Chief Judge, dissenting), enforced the Board's order, finding that the Board had "clarified the basis for its different results." (App. 3d). Dissenting, Chief Judge Bazelon concluded in part:

> "I dissented from the initial decision to remand the record for clarification. Having concluded from a variety of factors that the Board had failed to give the cases under consideration the necessary 'hard look,' I recommended a broader remand to enable the Board to reconsider 'the doctrinal quicksand' in the

> entire area. 512 F.2d at 572. Secondarily, I hoped to persuade the Board to avoid the temptation of offering a sterile post hoc rationalization. Unfortunately, my hopes appear not to have been realized.
>
> ***
>
> "Here, even though a majority of the Board found seven factual distinctions between Molloy and Santini, there is no reasoned discussion as to why the distinctions are significant. The Board does suggest that in Molloy, unlike in Santini, there was a 'layer of carrier regulation put upon the [owner-operators] beyond what was required by government regulation.' (Supp. order p.3). However, the Board never explains how substantial this layer must be in order for drivers to be considered employees rather than independent contractors or, in fact, why the extra layer imposed in Molloy distinguishes that case from Santini in light of their numerous similarities. Nor does the Board attempt to justify its results in terms of the policies of the National Labor Relations Act.
>
> ***
>
> "In sum, I do not believe the Board's supplemental order should be affirmed. No two snowflakes are identical, but for most purposes are considered

> indistinguishable. Here the Board distinguishes two snowflakes without explaining in terms of the policies of the Labor Act why it has done so. Because other companies concerned about whether their drivers are employees or independent contractors will find no guidance in the Board's decisions, I would, as I said before, remand the record 'for a thorough reconsideration of the doctrinal quicksand in this area.'" (App. 7d-9d).

Thereafter the Court denied the Union's petition for rehearing in banc.

REASONS FOR GRANTING THE WRIT

Owner-driver employment within the trucking industry has assumed increasing importance. The labor law status of owner-drivers who operate exclusively for particular carriers and who are integral parts of the carrier's business, is of wide significance to employers, drivers, labor organizations and the public. Numerous cases have come before the Board raising the issue of whether long-haul drivers who own the tractors which they lease to the carrier are employees or independent contractors. Yet, as found by Chief Judge Bazelon, the Board has not given this problem a "hard look." (App. 23b). The decision in this case "exists against a background of barely reconcilable precedents and of a failure of the Labor Board to provide a reasoned basis for its decisions regarding the definition of 'employee'".

(App. 22b). The Board's decisions show that the Board has been generally content to engage in the "counting" of factors for and against employee status without analysis of the relative significance of the factors which are listed. The result has been a "doctrinal quicksand" of "barely reconcilable" and actually "conflicting" precedents in this field.

The Board's refusal to give this problem a "hard look" was most apparent in the present proceedings. Here the Board has reached opposite conclusions as to employee status of owner-drivers in two carriers within the same Industry, operating under overwhelmingly similar circumstances. What is more, although the Board was clearly right in Molloy in finding employee status, its decision that Santini's owner-drivers are independent contractors not only conflicted with Molloy but also with applicable Supreme Court precedent. In addition the facts in Santini were similar to the facts in other recent precedents where the Board found employee status. Looking at the essence of the relationship, rather than peripheral factors lacking significance, the long-haul drivers in Santini's service are clearly not independent contractors.

The remand by the Court of Appeals offered the full Board the opportunity to give this area a "hard look" and to articulate consistent principles which are based on the actualities of the relationship and not on minor variations in the basic fact pattern. The Board declined this opportunity. The Union urges this Court to accept the case for review; hold that Santini's owner-drivers are employees under the Act and

articulate for this problem principles of law capable of consistent application in future Board cases.*

*In Point II of the Argument, we also urge the Court to review the decision below that Article 24 constitutes an unlawful "union signatory" clause.

ARGUMENT

I.

THE "CONFLICTING DECISIONS" IN SANTINI AND MOLLOY ILLUSTRATE THE "DOCTRINAL QUICKSAND" IN THE BOARD'S TREATMENT OF THE OWNER-DRIVER ISSUE. THEY "EXIST AGAINST A BACKGROUND OF BARELY RECONCILABLE PRECEDENTS AND OF A FAILURE OF THE LABOR BOARD TO PROVIDE A REASONED BASIS FOR ITS DECISIONS REGARDING THE DEFINITION OF 'EMPLOYEE.'" THE COURT SHOULD REVIEW THE DECISIONS BELOW IN ORDER TO RESOLVE THE CONFLICT BETWEEN DECISIONS OF THE BOARD AND TO SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH IS OF PERVASIVE SIGNIFICANCE IN THE TRUCKING INDUSTRY.

A. Statutory Framework; Standards for Review.

The Board and Court of Appeals held that Article 24 of the Contract was an unlawful "union signatory clause" rather than a lawful "work recapture" clause and that the Article and its enforcement violated Sections 8(e) and 8(b)(4) of the Act unless the owner-drivers in Santini's service are employees within the meaning of the Act. The Union considers that the Board's conclusion that Article 24 is a union signatory clause was in error and should be reviewed by this Court. See Point II below. However, we address ourselves at this point to the conclusion that Santini's owner-drivers are not employees and to the state of conflict and confusion which describes the Board's decisions on the status of owner-drivers in long-distance trucking.

Section 2(3) of the Act provides in relevant part,

> "The term 'employee' shall include any employee...but shall not include...any individual having the status of an independent contractor...."

As to the broad outlines for determining employee status there is apparently no dispute in this case with the statement of Chief Judge Bazelon (App. 10b),

> "Congress has quite clearly commanded that the common law definition of 'independent contractor' be the basic guide for distinguishing between 'employees' and 'independent contractors.' This does not mean that considerations of labor policy are irrelevant but that they be considered in light of the common law test of 'control.'" (Footnotes omitted).

Further defining the control test, the Court of Appeals in Grace v. Magruder, 80 U.S. App. D.C. 53, 148 F.2d 679, 681 (1945), stated:

> "The vital element which negates such independence in the relation between employer and employee, is the right to control the employee, not only as to final result, but in the performance of the task itself. And, it is the right to

> control or supervision itself, which is most important."

However, as stated by Chief Judge Bazelon,

> "How great a degree of control must exist, how that control is to be quantified and how various incidents of control are to be weighed compartively are questions left unanswered by Congress and the Board in its various efforts in this area." (App. 11b-12b).

Nor is it disputed that a degree of deference toward the Board's choice of competing consideration is required. But that deference was overplayed by the majority in this case, for the Board has not fulfilled the requirement of reasoned decisionmaking, reconciled its precedents, or avoided inconsistent decisions.

B. The Board Clearly Erred in Classifying Santini's Long-Haul Drivers as Independent Contractors, in light of Supreme Court Precedent and Board Precedent, Including the Molloy Decision.

1. The Board's Decision in Santini Conflicts with Supreme Court Precedent.

In N.L.R.B. v. United Insurance Co. of America, 390 U.S. 254 (1968), a case arising under the Act, this Court affirmed the order of the Board finding that United's "debit agents" were employees and not independent contractors. The Court recognized that the debit agents "perform their work primarily away from the company's offices and fix their

own hours of work and work days" (390 U.S. at 258) - similarly to the Santini long-haul drivers (who must, however, meet set delivery times). But the Court disregarded these details and stressed instead the basic aspect of the relationship between the company and agents, such as these factors:

a. "The agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations";

b. "They do business in the company's name with considerable assistance from the company and its managerial personnel and sell only the company's policies";

c. "The 'Agent's Commission Plan'... is promulgated and changed unilaterally by the company";

d. "The agents account to the company for the funds they collect under an elaborate and regular reporting procedure";

e. "The agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.

As found by Members Fanning and Jenkins, "comparable factors indicative of an employment relationship are present here." (App. 10 c). Indeed, it is clear that the Santini long haul drivers "are an integral

part of Santini's long-distance household moving business," (App.10c), "lack any substantial proprietary interest in [this] business," and lack "any real opportunity for entrepreneurial decisions by which [they] can measurably influence" their earnings. (App. 13c). Moreover, as found by Members Fanning and Jenkins,

> "pursuant to the regulations of the Interstate Commerce Commission and Department of Transportation with which carriers are required to comply, Santini strictly controls nearly every phase of the work of the drivers, including maintenance of equipment, hours of service, observance of safety standards, and the keeping of detailed records. The control over the drivers, which regulates every significant aspect of the manner and means of their performance of the long-distance hauling, is no less because it is exercised pursuant to governmental direction. The regulations are imposed upon the carriers and, to remain in business, they are required to control the manner and means of performance by the drivers. Certainly Santini's responsibility to third persons for damages resulting from any breach of these standards would be no less because they are Government imposed. <u>This is the essence of the employment relationship at common law which is controlling here.</u>" (App. 12c ; emphasis added).

2. The Conflict Between Santini and Molloy.

The Board's decisions in Santini and Molloy were clearly inconsistent; the Court below committed double error by remanding the Santini record for "clarification" and then affirming the Board's Supplemental Decision.

Molloy and Santini are both members of the New York City Moving Industry who engage owner-drivers for long haul operations under virtually identical circumstances. The essence of the work activity, method of compensation, form of operation, and carrier control in the two cases was nearly the same. The Board's post hoc list of distinguishing factors, aside from being inaccurate (App.9 d), was at best peripheral. As stated by Members Fanning and Jenkins (App. 18c), the Board applied

> "erroneous standards and this is evidenced by the inconsequential factors upon which it relies to justify reaching a different result in this case from that in Molloy. It applies standards of control which touch only peripheral aspects and do not go to the essence of the relationship. Testing the employment relationship by the standards we have set forth above, on the undisputed facts, precludes a finding that the long-haul drivers are independent contractors."

In sum, as stated by Chief Judge Bazelon, "No two snowflakes are identical, but for most purposes are considered indistinguishable." (App. 9 d). Since the Board in

this case attempted to distinguish "two snowflakes without explaining in terms of the policies of the Labor Act why it has done so," (ibid.) review of the decisions below is clearly indicated.

C. Background of Conflicting Board Precedent.

The conflict between Santini and applicable Supreme Court precedent, and between Santini and Molloy, alone requires review of this case. There is added the additional fact that Santini is inconsistent with other Board precedent, and that, overall, as found by Chief Judge Bazelon, the Santini and Molloy decisions "exist against a background of barely reconcilable precedent and of a failure of the Labor Board to provide a reasoned basis for its decisions regarding the definition of employee." (App. 22b). For example, in Ace Doran Hauling & Rigging Co. v. N.L.R.B., 462 F.2d 190 (6th Cir. 1972), affirming, 191 NLRB 428 (1971), the following factors were present:

(1) The carrier was authorized to operate pursuant to an ICC certificate and abided by the extensive ICC regulations affecting its relationship with the single owner-drivers;

(2) a clause in the lease agreement between the carrier and its single owner-drivers provided that the relationship between the parties is that of independent contractor;

(3) the single owner-drivers were compensated according to a rental percentage unilaterally determined by the carrier

on the basis of a predetermined revenue schedule;

(4) the single owner-drivers were required to pay for "bob-tail" insurance;

(5) the carrier paid for all public liability, property damage, and cargo insurance;

(6) the single owner-drivers paid operational expenses, maintenance expenses, and for damage caused by their negligence;

(7) the single owner-drivers agreed to conform their equipment to all law and regulations;

(8) the carrier occasionally advanced money to the owner-drivers, required periodic inspections, and conducted road checks;

(9) the carrier's dispatchers coordinated the movement of the owner-driver's loads;

(10) the owner-drivers selected their own routes and could refuse loads;

(11) the owner-drivers had no regular schedule and might take time off at their discretion;

(12) the carrier might cause the discipline of owner-drivers for being involved in accidents or in violation of ICC (DOT) rules; and

(13) the carrier asserted control over the owner-drivers in excess of that mandated by law.

462 F.2d at 191-192.

With minor exceptions, all of the above factors are present in the Santini case. In Ace Doran, the single owner-drivers were found to be employees. See also, in addition to Molloy and Ace Doran: Deaton, Inc., 187 NLRB 780 (1971), affirmed, 502 F.2d 1221 (5th Cir. 1974); Florida-Texas Freight, Inc., 197 NLRB 976 (1972); Pony Trucking, Inc., 198 NLRB 686 (1972), affirmed, 486 F.2d 1039 (6th Cir. 1973).

In the following recent cases the Board found that long-haul drivers were independent contractors on the basis of fact patterns similar to or stronger for employee status than the facts in Molloy: Conley Motor Express, Inc., 197 NLRB 624 (1972); Portage Transfer Co., Inc., 204 NLRB 787 (1973); George Transfer & Rigging Co., Inc., 208 NLRB 494 (1974); and Perkins Motor Transport, Inc., 222 NLRB 423 (1976).

Dissimilarities in outcome of similar cases would be less disturbing if the Board had developed standards for weighing the various factors which are listed in all of the cases. This the Board has not done. Lists are made; cases are distinguished, but nowhere does the Board as a whole seek to grapple with the problem of defining and making law in this field. No attempt is even made to determine the relative weight which should be assigned to the different factors.

The question of employee status under the Act is pervasive, fundamental and jurisdictional. Yet the Board seems unwilling or unable to confront it. What the Board

has offered in this case is its conclusion that the carrier in one case exerts more control over drivers than a carrier in another case, without any indication why the controls in the latter do not themselves establish employee status. Review of this case is clearly indicated to rectify this "doctrinal quicksand" and establish consistent standards for decision.

II.

ARTICLE 24 IS A LAWFUL WORK PRESERVATION CLAUSE UNDER THE BOARD'S OWN DECISIONS

In National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612 (1967), this Court held that a collective bargaining agreement which preserves for unit members work which they have "traditionally performed" is exempt from sections 8(e) and 8(b)(4)(B) of the Act.

The Court below affirmed the findings of the Board that Article 24 was not a lawful work preservation clause but rather an unlawful "union signatory agreement." (App. 6b).

Contrary to the Court's view, Article 24 assures that the Union's economic standards will be applied to the work of long distance hauling by confirming the status of the owner-drivers as employees when in the employer's service. In Teamsters Local 107 (S & E McCormick, Inc.), 159 NLRB 84 (1966) the Board approved a clause virtually identical to Article 24 in its function of

requiring the carrier to confirm contract drivers as employees while in the carrier's service. The Board stated:

> "The legitimacy of the Unions' objective in requiring all drivers performing unit work to be unit 'employees' subject to the applicable collective-bargaining agreements while performing such work is not converted into an unlawful 'cease doing business' one within the intent of Section 8(e) simply because, as an incident to their unit employee status, the drivers are required to comply with all terms and conditions of the bargaining contract, including the union-security requirement." 159 NLRB at 101.

The McCormick decision was vacated and remanded sub nom. A. Duie Pyle, Inc. v. NLRB, 383 F.2d 772 (3d Cir. 1967), cert. denied, 390 U.S. 905, on the ground that the clause in question constituted a union signatory clause. However, on the remand, the Board refused to adopt the Third Circuit analysis except as it constituted the law of the case.

It is clear that the sounder reasoning was supplied by the Board's original decision in McCormick. If a union may lawfully require that bargaining unit work be performed only by employees in the unit, and may lawfully require the employer to terminate business relationships with other

persons as a direct result thereof, it appears a fortiori that the union may impose a less draconian solution and permit the other persons to continue to perform the work upon becoming employees within the unit.

CONCLUSION

For the above reasons, it is respectfully urged that the Supreme Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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April 12, 1977

APPENDIX A

INITIAL DECISION OF THE NLRB AND ADMINISTRATIVE LAW JUDGE

Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousmen and Helpers of America (Santini Brothers, Inc.) and Karl Leib, Jr., Esq.

Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Santini Brothers, Inc. and Karl Leib, Jr., Esq. Cases 2-CC-1247 and 2-CE-52

January 8, 1974

DECISION AND ORDER

By Chairman Miller and Members Kennedy and Penello

On June 29, 1973, Administrative Law Judge Herzel H. E. Plaine issued the attached Decision in this proceeding. Thereafter, Respondent Union filed exceptions and a supporting brief, the Charging Party filed a brief, and the General Counsel filed a brief and a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

1. As the Board deems it unnecessary that all five of its Members decided the issues involved herein, the Charging Party's motion to that effect is hereby denied.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order. [2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent Union, Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives; and Respondent Company, Santini Brothers, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

DECISION

Herzel H. E. Plaine, Administrative Law Judge: The case involves the so-called "secondary boycott" and "hot cargo" provisions of the National Labor Relations Act (the Act).

2. The request of the Charging Party and Respondent Union for oral argument is hereby denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

Santini Brothers, Inc. (Santini) with its principal base in New York City, is engaged in the local and long distance moving of household goods, and in the local moving of office furniture and equipment, called commercial moving. For its local household and commercial moving, Santini uses its own moving vans--tractor-trailers and trucks--and its own employees including drivers who are members of the Union, under a union contract with an Association of New York City moving companies of which Santini is one. For its long distance household moving, Santini has contracted individually with a number of owner operators of tractors who, using mostly Santini-owned trailers, perform the service of loading, hauling, and unloading the household goods of each of the shippers from the household of origin to the household of destination for a percentage of the moving charges, established under interstate Commerce Commission (ICC) tariffs, paid by the shipper to the ICC authorized carrier, Santini.

Under article 24 of its current collective-bargaining contract (1971-74) with the association of the moving companies, the Union has taken the position that the long distance owner-operators are employees, called contract employees in the article, required under the union-security clause to become and remain union members. When, in the fall of 1972, none of the owner-operators had joined the Union and Santini had taken no measures to compel them to join, the Union caused a work stoppage at Santini's New York facilities on October 30, 1972. The work stoppage

was lifted on agreement of Santini to undertake to obtain signed union membership applications from the owner-operators and to refuse to "load" those who did not sign, on Union threat to further work stoppages if Santini did not comply. Some owner-operators signed up; but others refused to join the Union, and Santini in turn refused to allow them to load in New York.

Unfair labor practice charges were filed with the Board on November 8, 1972, on behalf of several of the owner-operators based in Florida, and a complaint issued January 31, 1973.1

1. On January 22, 1973, the Regional Director petitioned the United States District Court for the Southern District Court for the Southern District of New York for an injunction under Sec. 10 (1) of the Act to restrain the Union and Santini from, among other things, compelling owner-operators to become union members as a condition for hauling goods from and to New York City, and to otherwise maintain the status quo ante. Following the taking of testimony on February 7, 9, and 14, 1973, and oral argument, the court issued a temporary injunction on March 22, 1973, pending disposition of the instant case, Danielson v. Local 814 IBT and Santini, 73 Civ. 325 (Ward J., March 22, 1973).

The complaint charges (1) that, in violation of Section 8 (e) of the Act (text infra), the Union coerced Santini to enter into, and that both the Union and Santini maintained, an unlawful (hot cargo) agreement to force independent contractors, namely the owner-operators, to become and remain members of the Union, and to require Santini to cease doing business with the owner-operators who would not join; and (2) that in violation of Section 8 (b)(4) (i) and (ii)(A) and (B) (the secondary boycott provisions, text infra), the Union induced and encouraged employees of Santini to engage in a work stoppage on October 30, 1972, and threatened to cause additional work stoppages, in order to force Santini to enter and give effect to the unlawful agreement prohibited by Section 8 (e) of the Act, to force the independent contractors to become and remain members of the Union, and to force Santini to cease doing business with the independent contractors who would not join the Union.

The Union's defense is that, contrary to the position of General Counsel, Santini, and the Charging Party,2 the owner operators are not independent contractors but are employees of Santini, required by the union-security clause of the union contract to become and remain members of the Union as a condition of employment with

2. The complaint erroneously spells the Charging Party's name "Lieb."

Santini, and subject to discharge for failure to join the Union and pay dues.[3] The Union claims that the additional relationship between the owner-operators and United Van Lines, Inc., an ICC authorized nationwide carrier, for whom the owner-operators also perform household moving services under contract between Santini and United Van Lines, Inc., provides added evidence of the employee status of the owner-operators. If the owner-operators are employees of Santini, then the Union committed no hot cargo or secondary boycott violations respecting them.

However, the Union further argues, if the owner-operators are not employees, the Union's conduct through contract and work stoppage, was lawful primary action to recapture work of the bargaining unit employees lost (the Union claims) to the independent contractors, and not unlawful secondary action under the secondary boycott and hot cargo provisions of the Act.

The defense has framed the two principal issues to be decided, namely, are the contracting owner-operators independent contractors or employees of Santini; and, if they are independent contractors, is the Union nevertheless free to take contract and strike actions directed at Santini, to compel the independent contractors to join

3. In this connection, following the filing of the unfair labor practice charges, the Union requested Santini that it "discharge" 13 named owner-operators who had failed to pay union dues. Santini did not terminate its contracts with these (cont.)

the Union or require Santini to cease doing business with them if they refuse, as a means of recapturing for the bargaining unit employees work allegedly lost to the independent contractors.

The case was tried in New York City, March 22, 23, and 24, 1973. By agreement of the parties, the record includes the 3 days' testimony in February 1973 before the United States District Court, see fn. 1, supra. Also, with agreement of the parties, the Union was permitted to include in the record, after the trial concluded March 24, 1973, additional documents from the files of United Van Lines, Inc. (United), which documents were not available at trial. In response to a subpoena by the Union, United had representatives at the trial, one of whom testified at length and produced various documents, but United was not a party to the case.

General Counsel, the Union, and the Charging Party have filed briefs. Santini has not filed a brief, but orally stated its views at the opening of the trial, to wit, the owner-operators are independent contractors and not Santini employees, and that Santini was taking no position on the alleged violations of the Act.

3. (cont.) 13 owner-operators.

Upon the entire record in the case,[4] including my observation of the witnesses and consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Santini is a New York corporation with offices and places of business in the city and State of New York, Miami, Florida, and Chicago, Illinois, engaged in providing local and interstate moving services and related services.

In the representative period of a year to the filing of the complaint, Santini performed services valued in excess of $1 million, of which services valued in excess of $50,000 were derived from its interstate trucking operstions.

As it admits, Santini is an employer engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act.

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4. General Counsel has moved, on notice to the parties, for several transcript corrections, which have not been objected to and which are in order. While there are a number of other corrections that might have been suggested on all sides, since the correct intendment of the lagguage is fairly ascertainable from the context in which the errors appear, I have limited the corrections to these proposed by General Counsel. (Corrections here set forth are omitted from publication.)

The Union is a labor organization within the meaning of Section 2 (5) of the Act, as the parties admit.

II. THE UNFAIR LABOR PRACTICES

A. The Business of Santini

Santini is in the business of moving household goods, moving office furnishings and equipment called commercial moving, and of providing packing and related services for foreign shipment or export of goods.

Santini's base is New York City. It has an office and terminal on Jerome Avenue and a fine arts division on 49th Street. Its export division is in Maspeth, New York; and, principally for the promotion of its long distance moving to and from New York and other parts of the country, Santini has established branch offices in Miami, Florida, and Chicago, Illinois.

In terms of hauling, the moving industry of metropolitan New York City has developed three operational categories: (1) local, comprising New York City and a distance outside within a (rough) radius of 100 miles; (2) short haul or local short haul, comprising between 100 and 500 miles of New York City; and (3) long distance, all hauling beyond 500 miles of New York City.

Santini which is one of the larger, if not largest, of the New York City moving companies, engages in all three categories of hauling, although it does very little short haul work. According to Leo

Santini, executive vice president for domestic operations, the company's local household moving in the 10-year period 1962-72 declined greatly to the point of producing only about $100,000 to $200,000 annual revenue; whereas local commercial moving multiplied 50 times or better in the 10-year period, producing $2 million in 1972.

The local moving, both household and commercial, is done by direct employees of Santini. The drivers and helpers are members of the Union.

Santini's revenue from long distance moving of household goods has also experienced a dramatic growth since 1962, according to Vice President Santini, from a position of losing money on long distance moving prior to 1962. In that year, Santini began contracting as an experiment with owner operators of tractors for the loading and hauling of household goods in Santini trailers and delivery to the households at the long distance destinations. According to Vice President Santini, their New York competitors had already been doing this profitably, and Santini was the last major New York company to enter into such contracts.

The 1962 experiment was successful, said Vice President Santini, and the company increased its contracting until by the beginning of 1967 all long distance moving was done for Santini by contractors. Vice President Santini testified that the changeover in the 1962-66 period came about easily, and involved no company

pressure, because, earlier, drivers had left Santini to go into contracting with competitors, and other drivers were eager to try, since the contractors made more money (out of the commissions or percentages of moving charges even though paying expenses) than employees (on hourly wages).5 In addition, among older drivers and some others, there was a reluctance to continue or to begin to engage in over-the-road driving that meant absences from home, and among some there was a desire to get out of driving altogether; and for these employees, new jobs with Santini opened up in the growing field of commercial moving. 6

5. Vice President Santini testified that, at the start of 1962, Santini gave some financial assistance in the form of loans to enable a few of its drivers to purchase equipment to convert to contracting; but that such assistance was limited to former employees, and involved help in financing only 5 or 6 tractors out of the total equipment owned by the 55 to 60 contractors with whom Santini has dealt since 1962. At the time of the trial, he said, all loans for equipment has been paid off by the contractors involved.

6. An interesting example was the Union's secretary-treasurer, Charles Martelli, who became a full-time union official in 1965. Previously, for 14 years he had been a Santini employee. By his own account, in the period 1951-56 he was a helper and local driver; in the period 1956-62, he drove long distance; and in 1962, and continuing until he became a (cont.)

The period 1962-72 showed a big growth in long distance moving revenues for Santini, particularly in the second half, 1967-72. Prior to 1956 Santini did all of its booking of moves at the New York office and got little return haulage to New York, or elsewhere, compared to what it carried from New York to one of its most important long distance destinations, Florida. In 1956, Santini opened a branch office in Miami seeking to improve its return bookings. The going was slow at the start, said Vice President Santini. Revenue in long distance moving from Florida in 1956 totalled only $6,000. However, he said it caught on after a time, and the growth was dramatic (his language). In 1962, long distance moving revenue from Florida rose to $51,000, 1966 produced $302,000, and 1972 went to $820,000. Other revenue was generated, mostly attributable to the long distance moving,[7] so that the 1966 carrier operation from Florida produced a total of $483,000 or about one-fifth of the total New York-Florida revenue of $2,523,000, and the

6. (cont.) union official in 1965, he became a layout man and a foreman in commercial moving.

7. Vice President Santini noted a study showing that every $100 of long distance line haulage generated $40 of accessorial revenue--in packing, unpacking, storage, etc.

1972 carrier operation from Florida rose to $1,381,000 or almost two-fifths of the total 1972 New York-Florida revenue of $3,608,000.

Vice President Santini testified that Santini is an interstate carrier that has operating rates authorized by the Interstate Commerce Commission (ICC) for 28 states. It does not operate as Santini outside those 28 states. When its vans go beyond the 28 states, they do so in relationship and pursuant to contract arrangements with the national carrier, United, which enjoys nationwide authorization from ICC for carriage of household goods. Santini, like several hundred other moving companies throughout the country, is an agent or franchise representative of United, booking long distance moving business, providing local services of packing and storage, and providing the equipment and personnel for loading, hauling, and unloading the household goods. Santini provides the moving equipment and personnel by making available to United, under lease arrangements, the equipment and moving services that Santini has contracted for from its contractors. The leases (designated "permanent" for year round, "master" for intermittent, and "peak" for seasonal), though they differ as to the degree of use of the equipment on United's papers, do not indicate or contemplate any change in relationship between Santini and its contractors or between Santini and its employees, and expressly declare that any personnel provided by the franchise representative (Santini) shall not be

considered employees of United (Exhs. U-3 and -4).

In this connection, as testified to by Earl Freitag, United's vice president for administration, United has no direct employees who are drivers for it. Apart from about 28 to 30 contractor drivers who have contracts directly with United, according to Freitag, the bulk of drivers are the owner operators of the equipment contracted to Santini and other franchise representatives and leased by them to United. (In some instances where a contractor owns more than one tractor, or is not driving what he owns, the driver is a person or persons employed by him--see testimony of Thomas Wolfe regarding his relationship to contractor Earl Harris.) In no case, said Freitag, does the owner-operator of driver under contract with Santini have any contract directly with United.

Santini hauls (always by its contractors) throughout the United States for United, said Vice President Santini. It also books moves for United, some of which is hauled by other United agents. Santini's New York office was the No. 2 booker in 1972 (it previously had been No. 1) of the 500-600 offices in the country that book for United, and Santini's Miami and Chicago offices also account for substantial bookings. In 1972, out of Santini's total revenues of $9 million, about $1 million was derived from bookings and haulings for United (approximately half from haulings, and the other half from bookings and related sources).8

As already indicated, since 1972 Santini has performed all of its long distance moving (either on Santini or United bills of lading) through the instrumentality of the owner-operators or owner-drivers or contract drivers (as they are variously called) of the power equipment (tractors) leased by them to Santini. In 1972-73, according to Vice President Santini, there were 24 such owner-operators or drivers under contract with Santini. While, based on bookings, Santini was entitled to have had 9 or 10 vans, operated by such contract drivers, under permanent lease to United, meaning continuously in United's operation throughout the year, Santini was 2 or 3 short and had only 6 or 7 under permanent lease. The remainer of the long distance equipment and drivers were under master lease arrangements (except for a few who moved only intra-Florida), which allowed for an occasional United haul, usually a one-way outgoing or back haul, and some few were under peak load lease which called for continuous use on United bills of lading in a peak period.

8. Vice President Santini testified that on United bookings for which Santini acts as hauling agent, Santini receives 70 percent of the hauling revenue (out of which come the contractors' percentages for their work). For bookings which it does not haul, Santini receives a 20 percent booking commission, and if the order it places did not originate with Santini it splits part of the booking commission with the originator. In addition there are some revenues derived by Santini from (cont.)

B. Union Relationships

Santini is one of about 300 moving and storage companies of greater New York City who comprise 6 trade associations known collectively as the Moving and Storage Industry of New York, N.Y. (Industry). Since the 1930's, the Industry has bargained for the employer members as a whole with the Union, and entered into successive contracts which have provided the continuing contract relationships between the Union and the employer members of the association.

According to Herman Bader, president of Bader Brothers Van Lines, an independent interstate carrier (independent meaning not an agent for a national van line such as United), and a member of the Industry negotiating committee for the past 18 years, there are about 20 companies among the approximately 300, who do any significant amount of long distance moving out of or into New York City. These 20 companies are among the largest of the New York companies and all have contracted their long distance moving to owner-operators. 9

8. (cont.) United shipments that may come into or through Santini's warehouse.

9. Bader testified that, apart from the 20 companies engaging in the long distance moving, there are a few smaller companies that go into New England, within a 500-mile radius of New York City, the so-called short haul. These companies, said Barder, are not geared up for the real

Bader Brothers was one of the first of the approximately 20 New York moving companies who are in long distance moving to use contractors for its long distance moving, starting in 1948, and Santini was the last of these New York companies to convert to the contracting method, starting in 1962, completed in 1967. At the time of the 1971 union contract negotiations, according to President Bader, there were (and still are) a total of between 250-300 owner drivers who had contracted with New York City moving companies for long distance moving. In contrast, for the total industry there were (and still are) about 1,800 regular full-time employees, and an additional 1,200 part-time employees, the latter fact attributed to the seasonal nature of the moving business. Of the 1,800 regular full-time employees, approximately 1,000 are employed by the handful of the largest companies of which Santini is one, among the 300 companies who comprise the Industry.

9. (cont.) long distance work (beyond 500 miles of New York City) and use employees under the union contract for short haul. They seldom go beyond the 500-mile range, he said. Contract drivers, on the other hand, according to Santini's Traffic Manager Sclafani, do not like and frequently reject short haul moving because it is not lucrative for them. When Santini finds it necessary, on occasion, to ask a contract driver to handle a short haul move, Santini will pay him more than the standard 50 percent haulage commission, and pays from 60 percent to 70 percent of the haulage charge.

The Union's concern about use of the owner-operator method of moving first became visible in the 1962-65 contract between the Union and the Industry (Exh. GC-3). Article 12 (g) of that contract provided that the owner-operator commission or percentage method of operation would not be practiced on local work; that the percentage or commission method of operation would not be practiced on long distance moving (by employees); and that the Union and Industry would designate representatives to explore jointly the effects of the owner-operator operation on long distance moving.

In the 1965-68 union-industry contract (Exh. GC-4), article 12 (g) of the 1962 contract was repeated in an article 23, entitled "Owner-Operators," including a reference for study of the owner-operator operation on long distance moving to a joint labor management board. A new article 26, entitled "Subcontracting," appeared in the 1965-68 contract. It provided that no employer may subcontract all or part of the work or services it contracts for, except with union approval; and that in the event of such contracting all employees employed by both the prime and subcontractor shall be on the payroll of the prime contractor, who shall be liable for the wages, fringe benefits, and other conditions provided by the union-industry contract.

In the 1968-71 union-industry contract (Exh. GC-5), the "Owner-Operators" article 23 of the preceding contract (Exh. GC-4) became new article 24, again re-

iterating the intention of study of the subject; and the previous "Subcontracting" article 26 (of Exh. GC-4) became new article 23 (of Exh. GC-5) with added language stressing negotiation with the Union as well as consent.

In the current 1971-74 union-industry contract (Exh. GC-6), the previous "Subcontracting" article 23 (of Exh. GC-5) was repeated, again as article 23 (of Exh. GC-6). President Bader testified, without contradiction, that the "Subcontracting" article was regarded as having to do with local, and not with long distance, moving; and that neither his company, which has subcontracted long distance moving continuously since 1948, nor any other member of the Industry has been the subject of a union claim that subcontracting of long distance moving (that has been done without requesting its consent) was a breach of article 23 on subcontracting.[10]

10. In corroboration, Vice President Santini noted, without contradiction, that the Union has never claimed that Santini breached the article on subcontracting, since the time Santini began converting in 1962, without requesting union negotiation or consent, to owner operator contracting for long distance moving; and that in the 1972 discussions Union Secretary-Treasurer Martelli had with him, looking to compel Santini's coverage of the owner-operators as employees under the union contract, there was no mention of a claimed breach of art. 23 on subcontracting.

Notwithstanding the expressions of intention in three collective-bargaining contracts, from 1962 to 1971, to jointly study the matter of owner-operator operation in long distance moving, there was no study, according President Bader. Nonetheless, in the 1971 negotiations for the the current contract, according to Bader, the Union brought in a demand that the concept and method of operation by independent contractors had to go and that all who drove or worked on the long distance moving vans would have to be considered employees of the moving companies. The demand was presented, said Bader, in a manner indicating that, unless the Industry agreed, no drivers would be available for any purpose.

The positions of the two negotiating parties, as described by President Bader (and there was no other testimony on the subject), was the following:

1. The Industry negotiators were of the veiw that the owner-operators were independent businessmen, third parties for whom the union-industry negotiators could not negotiate, and not under the control of the few New York City moving companies with whom some 250-300 of them has contracted. The bulk of the long distance van line business was carried on by major companies outside New York City, all of whom utilized owner operators; and the member companies of the New York City Industry should not now be subject to a different mode of operation, that was imposed by a New York City union local who could not impose its views or control outside New York, and that would take

the member companies out of competition for the long distance hauling.

2. The union negotiators' position was that they didn't want to know of owner-operators or independent contractors, that all doing work for company members of the Industry should be defined as employees under the union contract. Bader emphasized that the union negotiators did not say they wanted to displace the contract drivers with employees, and they did not ask or suggest that the existing group of owner-operators be physically displaced by another group of persons to do the work. Bader noted that one of the union negotiators, Attorney Simon, said the Union wanted to recapture the long distance hauling lost over the years to the owner-drivers.

President Bader testified that there were no employee drivers available then, and there were none available at the time of trial, for long distance driving; that the Union has a problem getting and providing any men for any kind of work in the busy season; and that the Union did not express the view at the 1971 negotiations that it wanted the owner-operators to cease doing the long distance work because regular employees would do the work if the owner-operators were not doing it. 11

11. As indicated by Bader, and noted supra, there were a few companies that did some short haul moving (100-500 miles from New York City) and an occasional long distance move (beyond 500 miles) (cont.)

According to President Bader, the Industry negotiators analyzed their situation and recognizing that, of the 300 companies represented, the great majority had no concern with long distance moving, and that the Industry as a whole did not want a strike[12] or an end of the contract negotiations on the long distance moving issue, agreed to accept the Union's demand. This became article 24 of the current 1971-74 contract (Exh. GC-6), and provides as follows:

"Article 24--Contract Employees

A.1 All persons performing long distance driving under contract to an employer covered by this agreement (whether as "owner-operator," "owner driver," "percentage driver," "commission driver," or otherwise) shall be covered by this agreement as employees (hereinafter referred to as contract employees).

2. Contract employees shall be covered by this contract limited to those provisions set forth in this section and including the Union Security, Penison and Welfare provisions, Legal Separability, No-Strike, Grievance, and Arbitration clauses and Union Check-Off.

11. (Cont.) with employees; and, said Bader, a provision relating to them came into the current contract, Exh. GC-6 art. 11(I), recognizing entitlement of such a driver, who has been away from home for 5 consecutive days or more to 2 days leave without pay for personal business. (Footnote 12 is on next page).

3. The employer shall make appropriate provisions for Contract Employees as employees under Social Security Workmens Compensation and Unemployment Insurance benefits.

4. The employer specifically reserves the right consistent with its Agency Van Line Agreement, to control the manner and means and details of and by which Contract employees perform services as well as the ends to be accomplished. All other details and economic arrangements shall be the subject of a contract between the owner of the vehicle and the employer party to this agreement provided that they shall not conflict with the provisions of this article 24.

5. Contract employees shall be compensated under a "Separate Check" system, and other compensation and benefits under this agreement shall be separately compensated.

6. This agreement shall not be used to deplete the number of regular long distance drivers (other than Contract employees) presently employed by employers covered by this agreement.

12. Contemporaneously, there was a 3-week strike before negotiations were completed over the industry wage offer.

7. The employers shall in the assignment of work opportunities to Contract employees adhere to, as far as is practicable in the efficient operation of the employers business, assign work and attempt to equally distribute earning opportunities in a manner consistent with said employees qualifications, length of service with the employer, earning opportunities of said employees, equipment capabilities and agency van line agreement. (First in first out dispatch shall not be considered a violation of the equal earning opportunity.)

8. The foregoing agreement with respect to contract employees shall automatically be renewed upon the expiration of this agreement and renewals thereafter, and shall be reopened only upon the conclusion of a national agreement with the major van lines covering Contract employees on a national basis.

B. All loading and unloading of trucks operated by Contract employees covered by this Agreement, within metropolitan district, shall be performed by employees of the Employer. These employees shall be from the Employer's seniority list if available. Employees laid off shall be deemed available, and shall be recalled by the Employer in seniority order."

The union-security article, incorporated by paragraph A,2 of article 24, is article 13, a typical union-security provision requiring employees (after 31 days, etc.) to become and remain members of the Union or (on notice) suffer dis-

charge from employment.

President Bader testified that none of the owner-operators were invited to participate in the union-industry contract negotiations and no one appeared on their behalf.

C. Union and Santini Action

Vice President Santini testified that in May 1972 the Union requested a list of Santini's contractors, and that it was supplied to the Union on May 24, 1972.

On August 14, 1972, Union Secretary-Treasurer Martelli sent Santini a letter (Exh. GC-10) stating that Santini had violated article 24 of the union contract (Exh. GC-6) by failing to adjust operations to conform with its "contract employees" provisions. Two weeks later, on August 28, Martelli dispatched a letter to each of the Santini contractors (Exh. GC-11), including a copy of the union contract and a union membership application, and suggesting among other things that it was necessary as well as desirable that they join the Union.

Also in August or September 1972, Martelli came to see Vice-President Santini and they discussed the effect of Article 24. Vice President Santini expressed concern that a change in status from contractor to employee would be prohibitive in additional costs to the Company and to the contractors. He supplied some figures, indicated that the margin of operation would not allow the Company to pick up the extra cost, and stated his belief that the contractors

could not afford and would not pay the extra cost to them, and that the Company would lose its contractors. Among other things, Vice President Santini noted that the change in status of the contractors to employees would make Santini responsible for the contractors' hired help, with responsibility for workmen's compensation insurance, tax withholding, and other costs. Union Agent Martelli replied it was not the Union's intent to saddle Santini with these costs, to which Vice President Santini replied it would legally follow from the change of contractor status to employee stutus. Martelli said he would check with his lawyers. Martelli made no suggestion that Santini use its hourly wage employees to do the long distance moving, according to Vice President Santini, but he did say Santini would have to use the long distance contract drivers in accordance with the union contract and if they were not covered in as "employees," Santini could not use them.

There may have been another later discussion with Martelli, said Vice President Santini, but in any event on September 26, 1972, Santini sent a letter to each of its contractors (Exh. GC-12) noting that each had been sent the Union's letter of August 28 telling them of their obligation to join the Union, under the union contract, and that the Union had now set a deadline of September 29. The letter continued, that because the union contract also required Santini to make contributions on their behalf to the union welfare and pension funds and created other costs, Santini was requesting a renegotiation

of the existing contract with each of them. On the following day, September 27, Santini sent the Union a copy of the Santini September 26 letter to its contractors, with an updated list of the contractors (Exh. GC-13).

Neither the Union letters, nor the Santini letters, to the contractors appeared to have induced any action by them to affiliate with the Union.

On October 30, 1972, according to both Vice President Santini and Santini's traffic manager. Sclafani (and as stipulated by the parties), the Union caused a work stoppage at Santini's Jerome Avenue facility. Sclafani testified that the employees were outside and three union officials were present when he arrived in the morning. Sclafani and the company safety director met with the three union officials and the shop steward. The union officials made clear, said Sclafani, that the time had come for owner-drivers to start joining the Union, and, as Union Agent Bracco said, unless the applications started coming in now there would be continued work stoppage and possibly work stoppages at Santini's export division in Maspeth and at is fine arts division on 49th Street.

Union Agent Bracco submitted a timetable, said Traffic Manager Sclafani, that in 20 days Santini would have been in touch with all of its owner-drivers, and by that time only those who had submitted membership applications to the Union would be permitted to load or unload in the metropolitan district (of

New York City) and anyone who had not submitted a membership application would not be permitted to load or unload.

Traffic Manager Sclafani testified that he agreed to the Union's proposition, feeling sure that management would agree with him to end the work stoppage. The strike ended about 4 or 5 hours after it began, with Sclafani's agreement to get signed membership applications of the contract drivers to the union representatives as he obtained them, to refuse to allow nonsigners to load or unload, and to pay the employees for the loss of time involved in the work stoppage.

After discussing the subject with President Godfrey Santini, Traffic Manager Sclafani spoke, he testified, to each owner-driver present or reporting into the New York area. Sclafani told each owner driver of the October 30 work stoppage, and of the Company's dilemma if he did not join the Union. Sclafani claimed he made no "specific requests" for the contract drivers to sign; nevertheless, he obtained a number of signed applications and turned them over to the Union, permitting the signers to load and unload in New York. Some contract drivers refused to join the Union, said Sclafani, and Santini would not allow them to load or unload in New York.

Under date of November 10, 1972, the Union dispatched to Santini requests that it discharge, pursuant to union-security article 13 of the union contract, 13 named contract drivers who had not joined the Union and paid union dues (Exh.GC-14).

Santini did not terminate its contracts with these contractors. On November 20, there was a further work stoppage, according to Vice President Santini. In the meantime, the charge against the Union and Santini was filed with the Board on November 8, 1972, by Charging Party Leib, a Florida lawyer representing three of the Florida based contractors of Santini.

D. Status of Contracting Owner Operators in Santini's Long Distance Moving

1. The indicia

From the testimony of Santini's Vice President Santini and Traffic Manager Sclafani, United's Vice President Freitag, and Thomas Hugh Wolfe, who was first an employee of a contractor with Santini (commencing in 1967) and later a contractor himself with Santini (commencing in 1969 and terminating in January 1973); and from typical contracts between Santini and its contractors, the contracts between Santini and United, and related documents, the indicia for determining whether the contracting owner operators are independent contractors or employees of Santini have emerged.

Ownership of Power Units: Typically, the owners of the power units or tractors that pull the trailers in the long distance moving are the contractors of Santini. Santini does not own the tractors, but in most, though not all, cases owns the trailers that the contractors haul with their tractors. More

often than not the operator or driver of the tractor is its owner and the contractor with Santini, but in some instances the driver may be an employee of the contractor. Thomas Wolfe was in that category, starting as a codriver with contractor and owner-operator Earl Harris, and taking over for a period the sole driving when Harris was injured and could not drive. When Harris acquired ownership of more than one tractor (as has been the case with some others of the contractors), Wolfe leased one of the tractors from Harris (Exh. GC-15) and he (Wolfe) directly entered into a contract with Santini making the leased tractor and his services as contractor available for Santini business.[13] Wolfe's contract relationship continued even after Harris had terminated his contract for his other tractors with Santini.

By the contract arrangement, using the 1971 form (Exh. GC-7, Santini-Wolfe) which Vice President Santini said was basically the same contract as used since 1962 with minor modifications, the contractor undertakes to make his tractor available during the term of the contract for the exclusive use of the carrier (Santini) and to provide the moving services with the combined tractor-trailer equipment on the carrier's shipping contracts or bills of lading.[14]

13. Some of the contractors have incorporated, and Vice President Santini identified several who have done so.

Remuneration: Remuneration from the carrier to the contractor for all services performed by his vehicle, himself, and employees, is computed at various percentages of the rate schedules that the carrier charges the shipper (see, for example, articles 19, 20, and 21 of contracts, Exh. GC-7, and testimony of Vice President Santini). The rate schedules are usually tariff rates approved by the ICC and may sometimes be carrier bid prices at less than tariff rates.

14. The exclusive use provision stems from the ICC regulation that permits an authorized carrier to perform authorized transportation with equipment he does not own, provided that the contract or lease for the equipment gives him the exclusive possession, control, and use of the equipment, and that he assumes complete responsibility in respect thereto, for the duration of the contract or lease. In the case of a long term lease of equipment entered into by an authorized carrier of household goods, who wishes to make only intermittent use of the equipment, such exclusive use provision need only apply during the times that the equipment is operated by or for the carrier. See Exh. S-1 containing 49 CFR § 1057.4 (a)(4).

In contrast to the equipment that he has leased for the exclusive use of the carrier, the contractor or owner operator is not subject to any similar "exclusive use" obligation upon his personal services by reason of his contract with the carrier or ICC regulation. Thus, he may perform the services required by (cont.)

While the percentages tend to be similar for similar work under most contracts, they also vary for specific or special circumstances. Thus the usual percentage of the transportation service charge allowed the contractor is 50 percent on tariff rates and 53 percent on bid prices at less than tariff rates. However, some contractors receive 52-1/2 percent for transportation in the summer or peak service months; two contractors, who own and supply their own trailers as well as tractors, receive 65 percent; and for short haul (between 100 and 500 miles), which is not as profitable as long distance and which the contractors tend to reject, and for certain specific trips, usually in the summertime, Santini will pay a range of percentages from 55 percent to 70 percent.

There are certain additional charges for additional and accessorial services to the shipper, and, where a percentage is provided in the contract for the contractor, the remuneration may range as high as 100 percent for handling of bulky items, to 75 percent or 80 percent for packing, to 50 percent for waiting time.

14. (cont.) hiring others, and may himself drive other equipment for other carriers if he has the time and organization (testimony of Vice President Santini and contractor Wolfe).

It should be noted that the contractors have no minimum income guarantee from Santini, nor are they compensated for overtime or compensated in any other manner than by their percentage share of the allowable charges.

Contractor Control of Operation: The services for which the contractor is remunerated by the carrier (Santini) embrace execution of the complete order of the shipper to the carrier to accomplish the move of the shipper's household goods from the household of origin to the household of destimation. The services involve some preliminary packing or crating (unless, as in some larger moves, packing and crating is done preliminarily by the employees of Santini), loading of the moving van from household of origin, hauling over-the-road from point of origin to destination, unloading the shippers's goods in the household of destination, collecting payment from the shipper at destination (90 percent of Santini's household moving is c.o.d.), and promptly accounting for payments to the carrier.

In a typical long distance move, an estimator (for Santini) goes to the shipper's home and leaves or mails an estimate of cost. An order is written up, including a pickup date arranged with the shipper by the Santini sales department (in consultation with the dispatcher). Delivery time is spread over a period of time, usually 3 to 8 days after pickup. A call slip, the order for service, and a bill of lading are then turned over by the sales

department to the dispatcher.

The dispatcher projects moves chronologically and geographically, and accumulates loads of a group of individual moves per van, going into a particular area, that are both practical and advantageous for the contractor drivers to accept. In this connection the greatest percentage of Santini's long distance moving on its own bills of lading is New York-Florida and New York-Chicago. On moves outside Santini's certificated territory, United's dispatching at Fenton, Missouri, will be alerted by phone or mail and handles the assigning of loads, although a suggestion that a Santini contractor is or will be available in the area will frequently be followed. Santini contractors haul a considerable amount of New York-Los Angeles moving on United bills of lading.

While load assignments to the contractor drivers are on a "first come-first served" basis they are usually being worked out in advance of arrival by communication between dispatcher and contract driver, according to Traffic Manager Sclafani, because the contractor may refuse a load without penalty. If he refuses a load he does not necessarily go to the bottom of the list, he may even be called next, depending on the reason for the refusal. The dispatcher frequently juggles orders to work out an accommodation between carrier and contractor needs and preferences, said Sclafani, so that when a driver comes in the entire load for him has usually been established and accepted by him.

The dispatcher turns over to the contract driver the several orders for service and bills of lading that will comprise the load, and he proceeds to the homes of the shippers for pickup of their household goods. In the course of so proceeding he will obtain a weight ticket for the unloaded (tare) weight of his truck, since weight of the goods is an ingredient of the charge for moving, and will pick up helpers to assist him with the loading. In hiring loading helpers, the contractors obtain them where they can, frequently in warehouses in various cities. In any event the contractors make their own arrangements and pay for the help as their employees (in keeping with the contract provision with Santini, see for example arts. 3 and 4 of contract, Exh. GC-7). In New York City, since 1971 (because of par. B of disputed art. 24 of the union contract, Exh. GC-6), Santini has required its contractors to select helpers from the Santini seniority list of employees, if available, but if not available, the contractors are free to hire whom they wish. If a contractor takes men who are on the Santini seniority list, Santini will pay the men but bill the contractor for the time he uses such men.

The contractor driver proceeds to the residences of the several shippers, for loading. This is his first contact with the shippers and he establishes delivery contact information with each of them for several destinations. (Santini has no procedure on how the contractor must contact the shipper before delivery.) In each case the contract driver prepares an inventory (important for inspectional and claims purposes). Except where prelim-

inary packing of goods has been done for a large move in advance by Santini employees, the contractor and his helpers will do whatever packing and crating is necessary, using his own materials obtained at his own expense from whatever source he chooses (see art. 2 (b) of the contract exh. GC-7).

In loading the moving van, the helpers usually do the carrying and the contract driver usually does, or supervises, the placement of the goods in the van. There is no supervision of the move by Santini personnel. Sclafani testified that Santini has no posted or mailed rules or regulations for the contract drivers.

Pursuant to ICC regulations, the contract driver gives the household shipper a copy of the bill of lading, scale weight ticket, and inventory (which both sign at place of origin and destination).

In proceeding with the loaded van to its destination, the contract driver obtains the scale gross weight. The contractor hires any helpers and a codriver as his employees, if he thinks such help is necessary or desirable, subject only to the Department of Transportation (DOT) requirement that the second driver shall have supplied a completed DOT form, for the carrier, establishing that he meets DOT driver qualifications.

The contractor sets his own hours of work and those of his helpers, subject only to DOT limitation; and selects his own routes in making deliveries, subject only to the legal limitation that when operating under Santini bills of lading

(as distinguished from United bills of lading), he may not operate in States for which Santini has no ICC certification. Neither Santini nor United conduct any road surveillance or supervision of the contract drivers. The contract drivers are not obliged to call in each day (as salaried employees had been), said Vice President Santini, but frequently do call in for availability of additional tonnage, or for latest information on location or contracting the shippers for delivery. Contractor and carrier are responsible for payment of their own communications to each other and each must prepay such communications (art. 17 of contract, Exh. GC-7).

In effecting delivery of the household goods into the destination households of the shippers, again the contractor hires, as his employees, such helpers as he needs from whatever local source is available, except that recently in New York City he has been obliged to use Santini's seniority list of employees, if any are available under the disputed union contract art. 24, discussed supra). Santini exercises no supervision, through any of its employees, over the unloading of the vans and delivery into the households of the shippers.

After effecting delivery, collecting the charges, and remitting them, the contract driver indicates to dispatch his availability for the next assignment.

Vice President Freitag of United testified that, for goods moving on its bills of lading, United does not supervise the contract operations in any phase--be it loading, unloading, or hauling--that United has no employees, program, or directives for seeing these

functions done in a certain way, that it does no checking of the performance of the contract drivers and has no directions for their supervising codrivers, and that it has no policy or program respecting the type of helpers for loading and unloading.

Bearing in mind that United's lease arrangements with Santini in effect adopt, and do not purport to alter, Santini's contract arrangements with it's contractors, the summary of the operational practice would indicate that both Santini and United follow the expressed written intention of the Santini contracts with its contractors, that the contractors will completely direct operations and performance of the services, including direction and control of employees utilized (art. 5 of the contract, Exh. GC-7), and that the carrier will not endeavor to control the manner of prescribe the method of doing the portion of its business contracted for by the contractors (art. 22 of the contract, Exh. GC-7).

Costs and Incidents of Operation: The costs and incidents of operation are borne by the contractors in a pattern consistent with the operational responsibility they have assumed. The contractor hires and pays for his help, and is responsible for tax and social security withholding, payments, and reporting affecting them, and provides his own workmen's compensation and employer's liability insurance for them. (In this connection, neither the contractor nor his employees are accounted for on the carrier's books for tax or social security withholding, etc., or for workmen's compensation insurance,

or for other requirements or benefits relating to employees of the carrier.)

The contractor pays the operating costs of the equipment--fuel, oil, garaging, parking, scales, tolls, ferries, and road use taxes. He pays for the repairs of his tractor, and makes his own arrangements for repairs, fuel, garaging, and parking. While the expense of maintenance of trailers owned by the carrier is borne by the carrier, nevertheless the contractor is responsible to maintain the tires and tubes of the trailer (see arts. 8 and 10 of the contract, Exh. GC-7). The contractor pays for the overnight accomodations and other living expenses on the road. He pays for, and arranges procurement of, his own packing materials.

The contractor pays for his base state license plates, and the carrier pays for licenses in other states in which it wants the contractor to operate. The contractor pays for public liability and property damage insurance on the "bobtail" operation of the tractor unhooked from the trailer. As already indicated, the contractor must obtain and pay for workmen's compensation and employer's liability insurance for those he employes.

The contractor is responsible for loss of goods or damage in the course of moving the household goods. For shortages, he must reimburse the carrier for the actual amount paid the claimant. For breakage of fragile items he must also reimburse the carrier the actual amount paid the claimant. For other damage claims a formula has been established, by which the contractor must

reimburse the carrier $10 per item to a maximum of $100 per shipment. (See art. 14 or contract, Exh. GC-7.)

All of the enumerated burdens and responsibilities of the contractor are in effect whether he is operating on United or Santini bills of lading.

Contract Provisions and Practices for Public or Carrier Benefit: Because the long distance household moving business is subject to governmental regulation for protection of the consumer and for highway safety, the contracts between carrier and contractor include provisions directly required to be included by law, such as the provision giving exclusive use of leased equipment to the authorized carrier (already discussed supra). Other provisions may be included in the contracts or practices adopted, because governmental regulation places ultimate responsibility for compliance with certain requirements upon the carrier, notwithstanding the delegation of performance of the moving function by contract.

As the result of several reviews of inspection practice by DOT, it was determined that periodic 60-day vehicle and equipment inspection was suitable. Such a provision appears in Santini contracts, requiring the contractor to have the inspection required by DOT made every 60 days, with the cost of inspection shared between the carrier and contractor (art. 9 of contract, Exh. GC-7). Santini requires the contractors to submit those reports to it and keeps a record of them. United does not pay or contribute to

payment for the inspections (or necessary repairs) of such vehicles and equipment leased to its service, but it does keep a record of the inspections, since by law it would be required to stop operation of a vehicle in its service that was not inspected or in proper working condition. For inspections, the contractors may use any approved inspection stations.

In the matter of accidents, the Santini contracts provide that liability for damage as a result of fault of the contractor shall be upon the contractor (art. 8 of contract, Exh. GC-7). On reporting accidents, Traffic Manager Sclafani testified that Santini is required by DOT to report accidents. In consequence, he said, Santini has required the contract driver to notify it of any accidents. Vice President Freitag of United testified that DOT requires a periodic review of each driver, hence United keeps a record of chargeable (fault of van operator) and nonchargeable accidents; and if one driving on the account is involved in too many of too serious accidents, United's safety department may suspend him from United's service on prior notice to the franchise representative with whom the driver is a contractor or employee of a contractor. (As the witnesses testified, a suspension from United's service would not sever the driver's contract or relationship with Santini, and he would continue to drive for Santini so long as his contract was in force.) Of course the review of drivers' records is not limited to involvement in accidents. Thus, violation of DOT rules on driver use of drugs or alcohol would

also result in suspension; or failure of the driver to maintain daily logs required by DOT might also result in suspension (though not mandatorily).

DOT and ICC have requirements that drivers keep daily logs, fill out load manifests, and submit certificates of physical examinations; and both Freitag and Sclafani indicated that United and Santini check on these requirements being met.

In this connection, it is significant that neither Santini nor United purport to exercise disciplinary authority over the contractors (or contractors' employees) or to invoke disciplinary penalties or reprimands; and that the only remedy available and invoked where there is dissatisfaction with contract performance (including the contractor's failure to comply with government regulations, which compliance is an express obligation under the contract) is termination of the contract in Santini's case, or suspension (meaning elimination) of the contract driver from United's service in United's case. For Santini to terminate the contract, it must give 30 days' notice to the contractor, except that it may terminate the contract without notice if the contractor has failed to comply with his obligation to collect and account for money due on bills of lading of has participated in falsification of a weight certificate or vehicle load minifest. On his part, the contractor may terminate his contract with Santini at any time on written notice specifying the date of termination, provided he shall complete any outstanding work (see art. 25 of

contract, Exh. GC-7). Since the contractor has no separate relationship with United, even on the permanent (year-round) lease of his equipment by Santini to United, he can drop out of United's service anytime he chooses and go back to Santini, as Vice President Freitag pointed out. If he terminates his contract with Santini, the contractor owes no separate notice to United.

Santini requires that each contractor deposit with it a $3,000 cash reserve, on which it pays interest, and which it holds for the final settlement of accounts on termination of the contract (art. 18 of contract, exh. GC-7).

During the life of the contract, the contractor will also accumulate credits in a credit account with Santini as his commissions accrue. Since the contractor needs cash for current expenses on work to be performed pending final calculation of commissions for work done, Santini has provided a system of cash advances against credits in the contractor's credit account (which is a non-interest-bearing account).

For purposes of indentification in operation, the tractors and trailers operating under Santini bills of lading are painted with the Santini colors and lettering. Only the tractors and trailers on permanent lease to United (operating year round on United bills of lading) are painted with the United colors. No United markings or decals are placed on those vehicles that are on master (intermittent) lease to United.

On the other hand, there is no requirement that the contract drivers wear a uniform, and there has been no criticism of contract drivers for not wearing a uniform, according to contractor Wolfe. In his own case, said Wolfe, be bought and put some Santini patches on some uniforms he wore for ease of identification with customers.

. Relationship of the United Operation:

Under the preceding headings there has already been noted many if not most of the important aspects of the Santini contractors' participation in United's operation. As indicated, there is no direct contract relationship between United and any of the Santini contractors, and they and their moving equipment became available to United to the extent that their tractors and trailers or Santini trailers are leased by Santini to United. Even under the permanent, year-round, lease arrangement, the tie is nebulous since the contractor or contract driver may drop out of United's service anytime he chooses and go back to Santini service.

While on United's or Santini's service, as already noted, the contractor is in complete charge of loading, unloading, and hauling without supervision by United or Santini personnel; and as it is the case with Santini, the contractor whether operating equipment under permanent or master lease to United, may refuse loads without penalty.

The Santini contract drivers become available to United by virtue of the same process that makes them contract drivers

for Santini, i.e., they are interviewed by Santini's Traffic Manager Sclafani in connection with agreeing upon a contract with Santini and the starting date. There is no application form. Usually, said Sclafani, Santini's contractors have been qualified, experienced drivers; nevertheless, because of DOT regulations, each completes a questionnaire covering his background and physical status. United is furnished a copy, in the event the contract driver is to be used in its work; and if United is satisfied that the contract driver appears (from the questionnaire) to meet DOT requirements, and registers no objection with Santini, it is established that the contract driver may haul United tonnage. However, as already indicated, United may not sever a contract driver's contract if it is dissatisfied with his performance; it may suggest that the driver not operate further on United papers and he will go back to work on Santini papers.

Beginning in 1971, United instituted a van operator training program for permament lease drivers. The intention to include master and peak lease drivers was rescinded, said Vice President Freitag, although if any of these asks to attend (or the franchise representative on his behalf asks) they may attend. The training consists of an open discussion (among those attending) on maintenance, a lecture on safe operation on the highways, and a question and answer review of DOT and ICC regulations. United's files indicate that eight Santini contract drivers have taken the training program, and there have been no suspensions of a driver from United's service for failure to attend.

United has also instituted a performance awards program under which it awards gifts for outstanding performance by van operators, taking into account such things as revenue hauled and absence of law violations or accidents.

Vice President Freitag testified that United has no system of direct communications with its van operators, and no mailing system for their home addresses, but sends any communications to them through the franchise representative.

United has prepared an operator's manual (Ehx. U-10), which is a compilation of factual and legal data useful to a van operator, but copies of it have been sent to the franchise representative for them to distribute among contract drivers as appropriate. United does not follow up on the distribution, said Vice President Freitag; and Traffic Manager Sclafani testified that Santini has no policy on distribution of United's manuals and that no record is kept on their distribution to the contractors, and has no policy of checking for compliance with items in the manual.

United has also prepared an agency manual (Exh. U-9) for the franchise representatives themselves but, as Vice President Freitag testified, United does not send its representatives around to see to compliance with the provisions of the manual.

2. Independent contractors

The owner operators of the motorized equipment who have contracted with the carrier Santini for long distance moving of household goods are, in my view, independent contractors and not employees of Santini.

Central to this conclusion is the net total of the evidence that each of the contractors has within his own control the means of performing the contracted moving services and the method of performance, unsupervised in execution by the carrier whose business he performs. The restrictions upon him are largely those imposed by law on the governmentally regulated business of moving household goods by motor carrier, both with regard to consumer protection and highway safety.

The standard applied in differentiating "employee" from "independent contractor" under the Act is the common law agency test, N.L.R.B. v. United Insurance Co. of America, 390 U.S. 254, 256 (1968). This was made clear in the Taft-Hartley amendments (1947) of the Wagner Act. Id. Earlier, under the Wagner Act, the Board and the courts had rejected the "power of control" concept of "economic reality" in defining "employee" under the Act, N.L.R.B. v. Hearst Publications, 322 U.S. 111, 128-129 (1944), and see further explanation in Harrison v. Greyvan Lines (sub nom United States v. Silk). 331 U.S. 704, 713-714 (1947). Congressional reaction to this construction was adverse, and the 1947 amendment of Section 2 (3) of the Act specifically excluded "any

individual having the status of independent contractor" from the definition of employee. "The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." N.L.R.B. v. United Insurance Co., supra, 390 U.S. at 256.

Thus since Taft-Hartley,"In determining whether an individual is an employee or an independent contractor, the Board has consistently applied the common law right-of control test. Under this test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. On the other hand, where control is reserved only as to the result sought, an independent contractor relationship exists. The resolution of this question depends on the facts of each case, with no one factor being determinative." Fleet Transport Company, Inc., 196 NLRB 436, 439 (1972).

This history is useful because just prior to Taft-Hartley, the Supreme Court decided in Harrison v. Greyvan Lines, supra, that owner-drivers under contracts and in circumstances similar to those here, with a carrier like Santini, for the interstate moving of household goods, were independent contractors and not employees of the carrier. The determination was for the purpose of deciding whether owner-drivers were employees under the coverage of the Social-Security Act of 1935, and in making its determination the Supreme Court said it would "follow the same rule that

we applied to the National Labor Relations Act in the Hearst case."

What is significant to the controlling effect of Greyvan on the case at bar is that in Greyvan, even though using the broader "economic reality" test for defining employee under the pre-1947 National Labor Relations Act, the Supreme Court arrived at independent contractor status for the owner-drivers, which was the same result reached by the circuit and district courts below, applying the common law right-of-control-test (331 U.S. at 716-717) that has since turned out to be the standard for the Board and courts under the post-1947 Act.

Looking more closely at Greyvan, the ICC-authorized carrier had its principal office in Chicago with agencies in many cities for soliciting household moving business, and operated 38 States and Canada. As early as 1930, before passage of the Social Security Act, the carrier company had adopted the system of contracts with owner drivers of trucks of its own, driven by truckmen who were admittedly company employees. Thus (like Santini in this case) the company did its moving business under the two systems, one with contractor truckmen and the other with direct employee truckmen. 15

15. A contract between the company and a Teamster's local required all truckmen to be members of the union.

The owner-drivers were required under their contracts to haul exclusively for the carrier company, furnishing their own trucks, equipment, and labor necessary to pick up, handle, and deliver shipments. They were obliged to pay all expenses of operation, including fire, theft, and collision insurance that the company might specify (which turned out to be a blanket company policy for which the owner-drivers were charged proportionately). The company carried and paid for cargo insurance. It was the contractors' responsibility to pay for loss or damage to shipments and to indemnify the company for loss caused by them or their employees. The company paid for all Federal or state permits or certificates to operate the contractors' vehicles in the company's service as a motor carrier.

The contractors were obliged to collect all money due the company for shippers, to turn such money in at the offices to which they reported after delivery, and to post a $1,000 bond and cash deposit of $250 against final settlement of accounts.

The contractor was required at all times to personally drive his truck or to be present on it when a competent relief driver was driving, except in certain emergencies; and he was required to follow all rules, regulations, and instructions of the company. The instructions included directions as to where and when to load freight. (These several requirements are not imposed on the Santini contractors.)

All shipping orders or bills of lading were to be between the carrier company and the shipper, and if new freight was tendered to the contractor he was to notify the company so that it could complete the bill of lading in its name (a requirement similar to the Santini contracts' provision).

As remuneration, the contractors received a percentage of the tariff charged to the shipper by the company varying between 50 percent, and a bonus up to 3 percent for satisfactory performance.

The contractors were required to paint the destination "Greyvan Lines" on their trucks.

Each truckman was obliged to take a short course of instruction in the company's methods of doing business before he started hauling for the company. In addition there was issued to each a manual detailing the conduct of truckmen in performance of their duties. (A company official testified that the manual was impractical and that no attempt was made to enforce it.)

The company maintained a staff of dispatchers who issued orders for the contractors' movements, but not the routes to be used by them. At intervals, the contractors were to report their positions to the dispatchers.

Each of the contracts was terminable at any time by either party.

This summary of the Greyvan contracts and practice (derived from the Supreme Court's opinion) provides a remarkable likeness to

the Santini contracts and practice; but with the indication that the carrier company control over the contractors in Greyvan was tighter than with Santini and its contractors in several respects, notably requiring the contractors to follow all rules, regulations, and instructions of the company including directions on where and when to load freight, requiring the personal driving or supervision of the truck by the contractors at all times, and requiring each of them to take a course of instruction before commencing to haul.

Under this set of facts, and recognizing that the contract truckmen and their assistants were from one standpoint an integral part of the Greyvan freight transporting business, the Supreme Court was nevertheless impressed that the energy, care, and judgment of the contract truckmen conserve the equipment they own and increase their earnings, that they hire their own assistants, pay their own expenses with minor exceptions, and depend upon their own initiative, judgment, and energy for a large part of the success, 331 U.S. at 716. "Where the arrangements leave the driver owners so much responsibility for investment and management as here, they must be held to be independent contractors. (Citations omitted.) These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business,[16] in the other for any

16. This is a reference to the contract truckmen for Greyvan.

customer.[17] The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors." 331 U.S. at 719.

In my view, the decision in Greyvan is a persuasive as well as controlling precedent for finding that the Santini contractors independent contractors, who by comparison enjoy greater freedom from the carrier company's control than did the Greyvan contractors.

The Board, in more recent times, has added cumulative precedents for the same result.

In Reisch Trucking and Transporation Co., Inc., 143 NLRB 953 (1963), the company was a motortruck common carrier with terminals in New York, New Jersey, Pennsylvania, and Maryland. The company was party to a union contract with a Teamster's union local, on a multiemployer basis, that covered the company's 15 "city" drivers based at the Baltimore terminal, who were admitted employees engaging strictly in local cartage work with company equipment in the Baltimore-Washington area.

17. This is, a reference to the contract truckmen in the companion Silk case, who had an arrangement with Silk, a coal dealer, for delivery of coal to his customers, but who had the privilege of hauling for others.

The Union local sought to include an over-the-road unit comprising several owner-drivers of tractors and a non-owner driver retained by an owner of an additional tractor, who were under contract with the company to haul company owned or controlled trailers to and from the company's Baltimore and Pennsauken, New Jersey, terminals, at night. The company opposed the unit on the ground that the owner-drivers were not its employees but an employee of an independent contractor.

The Board found that the relation between the company and the owners of the tractors was governed by a standard lease (in use since 1956), for 30 days, automatically renewed for like periods unless terminated on 30 days' notice by either party (and there was evidence that a number of owners had terminated such leases.)

Under ICC regulations, the tractors were leased to the company for its exclusive use. The trailers hauled were sealed and the drivers did not engage in pickup or delivery of goods and had no contact with the company's customers. The drivers received a trip slip and manifest for each trailer hauled and had to maintain a log on each trip.

Under the lease the owner of the tractor undertook to provide the vehicle as the company required it together with a competent driver who remained the employee of the tractor owner, paid by him. Operational costs of the tractor (gas, oil, etc.) and maintenance were the tractor owner's responsibility and he was responsible for damage to it or the

company trailer, but the company paid for public liability and property damage insurance on the tractor-trailer. The company paid for licenses, taxes, and fines assessed against the tractor when in company use, and the company was responsible for compliance with ICC safety regulations and requirements for vehicle identification.

Unlike the city drivers, the owner-drivers did not participate in any safety program and were not subject to company rules that applied to the company drivers. The owner-drivers were governed by the ICC rules and regulations.

The contractor, of course, purchased and paid for his tractor and paid for its license in the home State, Maryland, but the company paid for license in other states. The contractor paid for collision-file-theft insurance, the company paid for cargo insurance. While the contractor would get his tractor maintenance performed where he chose, the company conducted periodic inspection of the tractors.

Remuneration to the contractors was $50 per round trip between Baltimore and Pennsauken, plus tolls, plus $2 per hour for excess waiting time. There were also some occasional extra jobs of the usual run at a fixed fee plus mileage.

Orders were assigned through the company's central dispatch on call to the drivers, who were free to refuse a run or extra job without reprisal. The company exercised no disciplinary authority over the contract drivers.

The company did no withholding of income tax or social security payments from contractors or their drivers and provided no workmen's compensation or fringe benefit coverage for them.

The Board held, 143 NLRB at 956-957, that the owner-drivers were independent contractors, and not employees of the company. The Board noted particularly the bona fide and absolute ownership of the tractors by the contractors, which gave rise to an inference of control over the manner of performance associated with the status of independent contractor. It regarded as significant in demonstrating the entrepreneurial nature of the contractors the fact that they determined whether to drive the tractors themselves or employ others to do so. Additionally, that the contractors could control, in part, their profit or loss not only by deciding whether or not to drive themselves, but also by diligence and efficiency in the repair and maintenance of their tractors by persons of their own choosing. The Board saw substantial independence in the virtual freedom of the contractor to decide whether to take an assignment, and in selecting routes of travel; and noted the contract expression of intent to establish an independent contractor relationship. Lastly, said the Board, "The control exercised by the Company over the work of owners and drivers is for the purpose of complying with the rules and regulations of the Interstate Commerce Commission and is not inconsistent with the independent contractor relationship." 143 NLRB at 957.

In Fleet Transport Company, Inc., supra, the Board had an issue similar to that in Reisch Trucking, supra. The Teamsters union local was seeking, and the company resisting, a unit that included tractor owner-operators, and their nonowner-drivers, who were under contract to a motortruck common carrier for, in this case, the intrastate (Florida only) transportation of petroleum products on behalf of several large oil companies. The company operated subject to the regulations of the Florida Public Service Commission (FPSC), which had adopted the federal Department of Transportation (DOT) regulations with some few modifications. Thus the contract driver had the prescribed duties relating, among other things, to submitting daily logs and maintenance and accident reports, checking equipment before operation, providing inspections at regular intervals, and displaying the company's name and certificate number on the tractor. The tractor, leased by the company, could not under FPSC regulations be simultaneously leased to another carrier; but the owner-operator could lease other tractors he might own to other carriers and he could drive for other carriers as well as for the company (a situation similar to that of the Santini contractors in the case at bar).

Without detailing here all of the details of the contract relationship, the Board concluded that the owner-operators were independent contractors, that the nonowner-drivers were employees of independent contractors, and that neither were employees of the company and were therefore excluded from the unit. The Board found that the

contractor, and not the company, determined what days and hours to work, what routes to use, where to have repairs made and to purchase fuel, and where to park his tractor when not in use. He was free to refuse loads without penalty and to decide whether to hire or fire a driver, what work rules to impose on his drivers, and what rates to pay and fringe benefits his drivers would receive. Essentially, said the Board, the only indicia of control over the means of delivering the petroleum retained by the company were those required by the FPSC. 196 NLRB 436, 439.

The Board makde two additional points in resolving the issue against a finding of an employer-employee relationship: (1) the termination clause of the lease, which gave the company an option to terminate by notice at specified intervals, with automatic renewal of the lease if the option were not exercised, is entirely consistent with independent contractor status; and (2) the fact that the company unilaterally determined the rates of commission paid to the owner-operators, and the terms of the lease, may show that the company's bargaining power is vastly superior to that of the owner-operator, but such inequality of bargaining power is not peculiar to an employer-employee relationship, 196 NLRB at 439, fn.7.

Again, in Conley Motor Express, Inc., 197 NLRB 624 (1972), the Board had the question of whether contractors who were owner-operators of tractors leased by them to the certificated motor carrier, and the nonowner-drivers of such vehicles, were properly includable in a unit of

over-the-road truckdrivers. The carrier company had leased 27 tractors, 25 of which were owner operated. Two of the owner-operators leased two tractors each to the carrier and each supplied a driver for his second tractor. In addition, the company leased 10 trailers from the owner-operators and also had in service 25 of its own trailers. The contractors and their equipment were mainly used for hauling steel from Pittsburgh area steel mills to consignees in five States.

The company also had three tractors of its own, driven by three salaried employees, usually on short hauls or for work in which contractors did not wish to engage.

The Board disagreed with the Regional Director that the carrier had created an employer-employee relationship with the contractors. It noted three factors which might tend to support the view that they were employees: (1) the degree of control over equipment and personnel reserved to the company required by and consistent with state and Federal (ICC and DOT) regulation of motor carriers, (2) the fact that the company unilaterally set the rates of compensation for the contractors, and (3) evidence that the company had liberal policies on cash advances, interest-free loans, and free loans of equipment to contractors in emergencies.

However, said the Board, these three factors alone did not establish that the company controlled the means by which the contractors performed their day-to-day transport and delivery duties under the lease agreements. On the contrary, the

following five factors suggested that the controls exercised by the company related solely to results to be achieved under the leases, and that an employer-employee relationship had not been established: (1) the contractors exercised a very substantial degree of freedom in scheduling the use of their equipment and in rejecting loads offered which they considered undesirable; (2) they were free to trip lease their equipment to other carriers; (3) they paid virtually all the costs of operation and maintenance of their equipment; (4) they were subject to almost no day-to-day supervision or control by the company; and (5) there was no pattern of regular discipline of contract drivers for acting contrary to any prescribed means or method of operation designed by the company. Accordingly, the owner-operators were found to be their employees and not employees of the company.[18]

18. Note also the consonant holding in Gold Medal Baking Co., Inc., 199 NLRB 895 (1972), finding an independent contractor relationship between a bakery and the owner-operators of trucks distributing the bakery's products.

There are a number of other Board decisions in the trucking field where owner-operators have been held to be employees rather than independent contractors, such as Deaton, Inc., 187 NLRB 740 (1971); Florida-Texas Freight, Inc., 197 NLRB 976 (1972); Pony Trucking, Inc., 198 NLRB No. 59 (1972); and the recent decision of my colleague Administrative Law Judge Sidney Sherman in a moving company case, Local 814, (cont.)

The foregoing examination of these precedents of independent contractor status in the moving and trucking industry, from Greyvan to Reisch to Fleet to Conley, provide over a span of the last 25 years the judgment of the Supreme Court and the Board that, even in a governmentally regulated business, arrangement for doing business, similar to that in this case, whereby small businessmen undertake performance of part of the principal function of the larger businessmen, is indeed independent contracting. Comparing the facts of the cases, the Santini arrangement

18. (cont.) International Brotherhood of Teamsters (Molly Brothers Moving and Storage, Inc.), 208 NLRB No. 43 (1974). I make no attempt, here, to distinguish in detail the facts and results in those cases, from the facts and results in the case at bar and the precedents upon which I have relied and regard as more closely related. However, I do note one general characteristic from reading the cited decisions that have found an employer-employee relationship, namely the stress on a layer of carrier regulations put upon the contractor beyond what was required by government regulations, impairing the contractor's independence.

This is not the situation in the case at bar. The evidence indicated conformity with ICC and DOT requirements--not more--and the ICC-DOT regulations themselves are comparable with, and contemplate that there will be and can be independent contractor as well as employer-employee relationships in the business of household moving by motor carrier.

appears to make as strong a case, if not stronger in some respects, for independent contractor status.

As in the other cases, the Santini contractors have all of the entrepreneurial indicia of investment in the ownership of expensive power units, in some cases multiple units and ownership of trailers as well, and shoulder all of the costs and arrangements of their operation and maintenance and the risks and costs of damage, including loss or breakage of the household goods in their care.

For their recompense, the contractors share a portion of the tariff charges that the carriers are permitted to charge the shippers. These percentages are prescribed by the contracts and are generally uniform, but there appears to have been some individual bargaining on certain accessorial charges and there clearly is bargaining by the contractors and carrier on the percentages for the occasional short haul the contractors may do. There are no minimum guaranties of earnings from carrier to contractor, and to the extent that advances for cash needs may be made to the contractor these are not carrier moneys but come out of the contractor's own credit for past earnings with the carrier.

The Santini contractors, who must be and are qualified to drive under DOT regulations, are not obliged to drive the equipment they lease to Santini but may hire and provide others who likewise qualify. The Santini contractors may refuse, and sometimes have refused, loads offered to them without penalty.

Once responsibility to pick up and deliver a load has been accepted from the carrier's dispatcher, the contractor is in full charge from the pickup to delivery. The contractor hires as his employees his own help at the points of origin and destination to assist in packing, loading, unloading, and, as in necessary, the over-the-road driving. He supervises these tasks and optionally participates in or assists in their performance. The carrier, on whose bills of lading the contractor is working, does not supervise or direct any portion of the moving operation from pick-up to delivery. The contractor selects his own routes for delivery, and the hours of work for himself and his men (within DOT limitations); and the expenses incident to effectuating delivery such as fuel, tolls, overnight accommodations, and communications are his burden.

None of this relationship and its incidents, including freedom from carrier direction and supervision of peformance, are altered when the Santini contractor is moving household goods on the bills of lading of the national carrier--United. Santini, to comply with ICC regualtion, has leased to United, either for year-round use (permanent lease) or intermittent use (master lease), its right to use the contractor's equipment, but there is no contractual relationship between United and the Santini contractor, with whom United deals and communicates through Santini. A contract driver may drop out of United's service anytime he chooses and revert wholly to Santini service. Neither Santini nor United purport to have any system of disciplining contract drivers.

The United training program for operators of permanent lease vehicles is in essence a form of refresher for experienced drivers but even if the program were more than that it would not be inconsistent with independent contractor relationship, see Greyvan, supra. The United awards for good performance are no more than a bonus in addition to the agreed remuneration, see Greyvan, supra.

The requirements on the contract drivers for physical examinations, keeping of daily logs, periodic inspections of equipment, and the like are requirements arising from government regulations which, as the Board has said more than once, are not inconsistent with the independent contractor relationship, see Reisch and Fleet, supra.

In all of the transactions and relationships between the contractors, on the one hand, and the carriers, Santini and United, on the other, including the performance of functions, recompense, the keeping of books, and the accounting to government agencies, insurance companies, and the like, the contractors are not treated or carrier or recompensed as employees of the carrier. On the contrary, the contractors are dealt with and accounted for as independent contractors of the carrier Santini, and their contracts with Santini state the intention to establish that relationship. The total facts warrant the finding that the contractors are independent contractors.

E. 8(e) Violation [19]

Article 24 of the union contract (Exh. GC-6), set out in full under heading B, above, requires that any person doing long distance driving under contract with an employer covered by the union contract, whether as owner-operator or commission driver or otherwise, shall be covered by the union contract as an employee, called contract employee. However, it is further provided that, except for the specific provisions of the article, the details of economic and other arrangements between the contract employees and the employer shall be the subject of the individual contracts between them.

The specific provisions of article 24 make applicable to the contract employees the union security, union checkoff, pension and welfare, no-strike, grievance and arbitration, and separability clauses of the union contract. However, the employer

19. Sec. 8(e) of the Act provides, in pertinent part:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing busness with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void....."

is to compensate the contract employees under a "separate check" system, and is to provide them social security, workmen's compensation, and unemployment insurance benefits under the separate compensation system. There is reserved for the employer the right, consistent with its agency van line agreement, to control the manner of performance of contract employees, and to assign work in a way that attempts to reconcile equal earning opportunity with seniority, qualifications, equipment capabilities, and agency van line agreement. First-in-first-out dispatch is stipulated not to be a violation of equal earning opportunity. Lastly it is provided that the agreement (under the article) shall not be used to deplete the number of regular long distance employees, as distinguished from contract employees, presently employed by covered employers.

An additional paragraph B, article 24B, requires that loading and unloading within the metropolitan district of trucks operated by contract employees shall be performed by employees on the covered employer's seniority list, if available, including employees in layoff status.

Except for compliance with article 24B, Santini did nothing effectual to comply with article 24 until, under compulsion of the union demand of October 30, 1972, accompanied by a work stoppage or strike and threat of more, Santini sought to require its contractors to join the Union, and succeeded with some.

The inquiry, then is whether the object of the Union's conduct and of the agreement

respecting the contract drivers (article 24) was "primary"--intended to preserve fairly claimable unit work to unit members in the employ of the contracting employer--or "secondary"-- aimed at regulating the labor policies of other employers including self-employed persons. If the object was primary, the agreement did not violate Section 8(e) of the Act, even if its incidental effect caused the employer to cease doing business with other persons; whereas if the purpose was secondary, such as limiting subcontracting to employers who recognize the union or who are signatory to a contract with it or who are members of it, the agreement was unlawful and a violation of Section 8(e), Retail Clerks International Association Local 1288 (Nickel's Pay-Less), 163 NLRB 817, 818-819 (1967), affd. 390 F.2d 858, 861-862 (C.A.D.C., 1968), finding violations of Section 8(e) and 8(b)(4)(i) and (ii)(A), among other things.[20]

20. The same primary vs. secondary object test applies to determine violations of Sec. 8(b)(4), since the "hot cargo" provision. Section 8(e), is a complement of the "secondary boycott" provisions of Section 8(b)(4), in effect banning agreements to achieve a secondary boycott in advance. National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 634-635 (1967).

The circumstances surrounding article 24, looked at from the situation of Santini alone or of the Industry (New York City multiemployers association) as a whole, indicated[21] that over the period 1962 through 1966, Santini converted completely from employee long distance moving to contractor long distance moving,[22] that Santini was the last of the approximately 20 Industry companies who engage in long distance moving to so convert, and Bader Brothers was among the first, starting in 1948. Numerically, most of the Industry companies have not and do not engage in long distance moving (except as order takers from others). A few of the Industry companies, Santini among them, have done and do some short haul (100-500 miles of New York City) using employees; but for Santini this has been a very small amount of business. Only on rare occasions, usually in an emergency, has a Santini employee been asked to do a move over 500 miles, under the conditions existing in the last several years. On

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21. Testimony of Vice President Santini and Traffic Manager Sclafani of Santini, Union Secretary-Treasurer Martelli, and President Bader of Bader Brothers for the Industry, related portions of which have already been discussed under headings A, B, and C, above.

22. Long distance meaning over 500 miles. The current union contract still carries over an old definition of long distance as meaning over 90 miles; but the testimony, already described under heading A, indicated that this is obsolete, that up to 100 miles of New York City is regarded (cont.)

the other hand, the long distance contractors are not interested in (because unprofitable for them) and have seldom done short haul under the conditions existing in the last several years; when they have done short haul, usually to meet the carrier's emergency, they have generall been able to exact from the carrier a higher percentage of the hauling revenue than is normally paid for long distance hauling.

Immediately prior to 1962, Santini did all of its long distance moving with approximately 12 employees who spent about 65-75 percent of their time on such work, according to Vice President Santini.[23] Currently, Santini has 24 contractors, who do nothing but long distance moving on Santini or United bills of lading, representing an enormous increase in long distance business, particularly in the period 1967-72 (see heading A, supra). Nine of the 24 Santini contractors are based in Florida. Including Santini's contractors, there are between 250 and 300 contractors, all told, doing the long distance moving of the 20 New York City companies so engaged.

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22. (cont.) as local, between 100 and 500 miles is short haul, and over 500 miles is long distance.

23. Union Secretary-Treasurer Martelli thought the number between 1955 and 1962 was more like 40 employees, but there were comings and goings in employment in the 7-year period and he was not able to establish this as the number of such employees at a given time. Moreover, his figure was highly improbable, since Santini did much less long distance business per year in the period than it has done in the subsequent 1962-72 period and currently when it now utilizes 24 contractors for its long distance moving.

While there has been practically total conversion from employee to contractor long distance moving by the (New York City) industry in the period 1948-67, there has not been a lessening of unit jobs, and there has been some increase for two reasons: (1) the increase of long distance moving has generated related work, performed by bargaining unit employees, calculated in revenue at about 40 percent of the long distance revenue; and (2) although local household moving business has declined, there has been a great increase in local commercial moving, performed by bargaining unit employees.[24]

President Bader testified that his company, and others, have used contractors for long distance moving continuously since 1948, and that his company, like others, has no employee on its payroll doing long distance moving. When the "subcontracting" article was first introduced into the 1965-68 union contract (as article 26), its terms required specific union approval for subcontracting and that all employees of the subcontractor shall be on the payroll of the prime contractor.[25]

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24. In this connection, commercial moving requires about three times more helpers per driver than household moving. The testimony indicated that the number of drivers represented by the Union in 1972-73 was about the same as in 1962, but the number of helpers has increased substantially.

25. The article was repeated in the 1968-71 union contract and in the 1971-74 union contract as art. 23, except that it provided for negotiating with the Union on the matter of any subcontract.

Nevertheless, neither then, nor since, according to Bader, was there any claim by the Union that his company, or any other doing long distance hauling by means of contractors, was in violation of the subcontracting article (now article 23), which he asserted, without contradiction, related only to local moving business (despite its more general wording). Vice President Santini buttressed this view of the situation with uncontradicted testimiony indicating no complaints from the Union that Santini violated the subcontracting article either in the course of effectuating its changeover in long distance moving from employees to contractors, or in the 1972 discussions between the union representatives and Santini where the Union took the position that the contractors must join the Union.

Moreover, according to President Bader, when the "contract employees" article 24 came into the 1971 negotiations and union contract, there was no bargaining proposal that the companies use their employees in place of the long distance moving contractors. Nor did the Union take the position that it wanted the moving contractors displaced by bargaining unit employees (notwithstanding it wanted the contractors defined as employees), because there were not then and are not now bargaining unit drivers available for long distance driving, said Bader. Indeed, said Bader, the Union has a problem in providing any additional men for any kind of moving, particularly in the busy season,

noting some experiences.[26] Again, Vice President Santini buttressed this view of the situation, indicating that in the Union's 1972 discussions with him concerning the contractors joining the Union, there was no suggestion that Santini use its hourly employees to do long distance work, or that such employees would or could do such work.

In sum, apart from talk by a union lawyer at the Industry-Union negotiation about seeking to recapture bargaining unit work, see heading B, supra, for a number of years (since at least 1967) there has been no body of bargaining unit employees, including Santini employees, who have performed long distance moving or for whom to preserve or recapture the long distance household moving business. As developed by the record of this case, the plain fact is that in New York City, at least, the moving business has undergone several gradual changes over a period of years and, among these, has turned for long distance performance to a new breed of small independent businessmen, frequently not based in New York, and capable and willing to move constantly about the country

26. Union Secretary-Treasurer Martelli's assertion that there are many qualified and willing employees for long distance moving fell rather flat in light of his April 1971 communication to the Industry about the need for a training program to meet the shortage of manpower in the whole of the moving business and his indication at trial that no program had been started. Moreover, Traffic Manager Sclafani testified that the Union has never come to him to say that Santini's use of contractors was taking (cont.)

with their own power units. The New York City Industry bargaining unit employees have apparently adjusted to the changes without economic loss, acquiring increased local work (and possibly more desirable work than long distance hauling from the standpoint of a local employee).

Against this background, it is useful to turn to what was said and held by the Third Circuit Court of Appeals in A. Duie Pyle, Inc. v. N.L.R.B., 383 F.2d 772, 777-778 (1967), cert. denied 390 U.S. 905 (1968), concerning the union contract provision that required

> owner operators and fleet owners to become employees and thus to join the union in order to retain the work which they have been doing on subcontract. On their face these requirements are "secondary" in their purpose as well as their result. They do not require a carrier to put an end to subcontracting, but only to terminate it as to its subcontractees who refuse to become members of the union. Thus, their effect is to

26. (cont.) work from a Santini employee driver, or that one of the Santini employee drivers would like to do long distance moving as an employee. On the contrary, he said employees have on a number of occasions come to him asking if they might become contract drivers.

make the continuance of the relationship between the employer and an independent contractor depend upon the latter's decision to become a member of the union if he is an owner-operator and to require his employees as well as himself to become members of the union if he is a fleet-owner. The requirement therefore makes the central test of the employer's continuing to do business with such an individual his internal labor policy and not his maintenance of union wage scales or similar conditions with otherwise might adversely affect the unit members. This is substantially similar to provisions which permit an employer to subcontract only with third parties who are unionized. Such provisions have repeatedly been struck down under §8(e) as implementing illegal secondary objectives. See, e.g., N.L.R.B. v. Joint Council of Teamsters No. 38, 338 F.2d 23, 28, 30-31 (9 Cir. 1964); Meat & Highway Drivers, Dockmen, Helpers & Misc. Truck Terminal Employees, Local Union No. 710, etc. v. N.L.R.B., 335 F.2d 709, 717 (D.C. Cir. 1964); District No. 9, International Association of Machinists v. N.L.R.B., 114 U.S. App. D.C. 287, 315 F.2d 33, 36-37 (1962).

The present provisions, to the extent that they require the

subcontractees to become employees and members of the union, therefore must also be declared invalid. As in the case of secondary boycotts generally, a union may not employ a collective bargaining agreement with one employer as a means of effectuating its object to coerce another employer to unionize. Nor may it by this means seek to coerce self-employed persons to become union members. Congress has made this clear by §8(b)(4)(A) which prohibits secondary boycotts with an object of "forcing or requiring any employer or self-employed person to join any labor ...organization...." The self-employed owner-operator is as much entitled to protection from coercion to join a labor organization as is a fleet-operator who may have one or even many employees.27

In Meat and Highway Drivers Local 710 [Wilson & Co.], v. N.L.R.B., 335 F.2d 709, 717 (C.A.D.C., 1964), cited with approval in Pyle, supra, the court of appeals struck down as violating Section 8(e) of the Act

27. On remand, Highway Truck Drivers and Helpers, Local 107 etc., 199 NLRB 531 (1972), the Board accepted the court's view of the contract clause as the law of the case and found that the contract clause violated Sec. 8(e) of the Act, and that the union violated Sec. 8(b)(4)(i) and (ii)(A) of the Act by inducing employees of McCormick to strike or threaten to (cont.)

a "union signatory clause" under which the employer engaged to make all effort to subcontract with cartage companies who employed members of the union local, saying that the clause "requiring or encouraging a boycott of cartage companies who do not have union contracts is a violation of Section 8(e). To make selection of subcontractors turn upon union approval bears only a tenuous relation to the legitimate economic concerns of the employees in the unit, and enables the union to use secondary pressure in its dispute with the subcontractors."28

Still later, the district of Columbia Circuit citing Pyle, supra, with approval, affirmed the Board (163 NLRB 817) in Retail Clerks Union Local 1288 v. N.L.R.B., 390 F.2d 858, 861-862 (C.A.D.C., 1968), supra, holding that a clause of the union

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27. (cont.) strike and by coercing McCormick, with an object of forcing McCormick to enter the prohibited agreement.

28. The court distinguished and held valid a "work allocation clause," requiring that meat deliveries in Chicago be made by local employees covered by the union contract, on the ground that it had a primary work preservation objective, that involved recapture of work (as distinguished from work acquisition, said the court) which the local deliverymen had lost when meat packers moved out of Chicago, 335 F.2d at 712-714. But note also a distinction placed on this holding in Local Union No. 282, Teamsters (D. Fortunato, Inc.), 197 NLRB 673 (1972), where the Board held a union contract clause violated Sec. 8(e), and union action (cont.)

contract with retail stores, requiring that demonstrator employees of suppliers of the stores must comply with the contract and become union members, was a union signatory clause in violation of Section 8(e) of the Act, and that union striking and picketing to obtain the clause constituted violations of Section 8(b)(4)(i) and (ii)(A) and 8(b)(3) of the Act.

In Milk Wagon Drivers and Creamery Workers Local Union No. 66, 181 NLRB 882 (1970), a clause of the union contract with employer distributors of dairy products required that all jobbers delivering milk for the distributors shall be members of the union. The Board held that the clause violated Section 8(e) of the Act since it required the distributors to compel the jobbers, whom it found to be independent contractors, to become members of the union. It was found that the objective of the clause was secondary in nature - enhancement of the union's institutional interests - and a means to use one employer to coerce self-employed persons to become union members.

From the foregoing, it would therefore appear that article 24 of the union contract in this case, requiring the independent contractors of Santini to become employees of Santini and members of the Union, in its terms and effect violates Section 8(e) of the Act.

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28. (cont.) violated Sec. 8(b)(4)(i) and (ii)(A)(B), because the clause and action were viewed as an attempt to "recapture" work not performed by bargaining unit employees.

Section 8(e) makes it an unfair labor practice to "enter into" any such forbidden agreement. Article 24 first came into being in April 1971. The charges in this case were filed November 8, 1972. Nevertheless, the violation of "entering into" the unlawful agreement, prohibited by Section 8(e), is established when a respondent, whether union or employer, reaffirms the illegal agreement or insists on its enforcement within the 10(b) period, namely, within the 6 months prior to the filing of the charge. Dan McKinney Co., 137 NLRB 649, 653-657 (1962); Milk Drivers and Dairy Employees, Local Union No. 537, 147 NLRB 230, 231 (1964).

Here, both the Union and Santini reaffirmed, and thereby entered into, the unlawful article of the union contract well within the 6-month period before November 8, 1972, as detailed under heading C above. Thus, the Union notified both Santini and its contractors of the necessity to comply with article 24 in August 1972; warned Santini to comply in September 1973; engaged in work stoppages and threatened more to obtain compliance in October and November 1972; and demanded that Santini terminate the contracts of thirteen contractors who refused to join and pay dues to the Union in November 1972. Santini, on its part, requested the contractors to renegotiate their contracts in September 1972; agreed with the Union to solicit and solicited union memberships from its contractors in October and November 1972; and refused to permit loading or unloading by contractors who would not join the Union in October and November 1972. The violation of Section 8(e), by both the Union and Santini was established.

F. 8(b)(4) Violations[29]

For the purposes of this case, Section 8(b)(4)(i) and (ii)(A) forbade the Union from engaging in or inducing strike action or threatening or coercing an employer on two counts: (1) where an object was to require an employer or self-employed person (Santini's contractors) to join the Union, and (2) where an object was to require an employer or self-employed person (Santini) to enter into the "hot cargo" agreement prohibited by Section 8(e); and Section 8(b)(4)(i) and (ii)(B) forbade the Union from engaging in action to achieve the secondary objectives it had sought to impose in advance through the agreement that contravened Section 8(e).

29. Section 8(b)(4)(i) and (ii)(A) and (B) provides as follows:

8(b) It shall be an unfair labor practice for a labor organization or its agents-

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by (cont.)

As noted, under heading E, supra, in Pyle and its remand Highway Truck Drivers Local 107, and in Retail Clerks Local 1288, where the union in each case had engaged in a strike to obtain a clause forbidden by Section 8(e) that included compelling self-employed persons or employees of another employer to become union members, the Board and courts found violations of Section 8(b)(4)(i) and (ii)(A) (as well as violations of Section 8(e)).

In Highway Truck Drivers and Helpers, Local 107 (E.A. Gallagher & Sons), 131 NLRB 925 (1961), enfd. 302 F.2d 897 (C.A.D.C., 1962), the Board and court found violations of both Section 8(b)(4)(A) and (B). In that case, Gallagher was a trucking company that did local cartage in the Philadelphia area with its wage employees, and longer distance over-the-road hauling of stell, that included points in Pennsylvania and New Jersey using independent contractor owner operators who were paid on a ton-mile basis. The union

29. (cont.) section 8(e):

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9. Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing...."

struck for a clause in its contract with Gallagher which, the Board found, would curtail deliveries by independent contractors in a 40-mile radius of Philadelphia and cause Gallagher to cease doing business with the independent contractors. The Board found that the contract provision would contravene Section 8(e) of the Act, and that the strike by the union with an object of compelling inclusion of the provision violated Section 8(b)(4)(i) and (ii)(A) of the Act. And, said the Board, since a further object of the strike necessarily was the forcing of Gallagher to cease doing business with the independent contractors, the union also violated the secondary boycott provision in Section 8(b)(4)(i) and (ii)(B), 131 NLRB at 932.

In the case at bar, the Union has engaged in work stoppages at Santini's place of business and threatened more, with an object of forcing the independent contractors of Santini to join the Union, clearly in violation of Section 8(b)(4)(i) and (ii)(A).

Likewise, the Union's coercive insistence on Santini's compliance with the illegal article 24, including work stoppages and threats of more, was a reaffirmation and therefore reentry of the illegal article, also in violation of Section 8(b)(4)(i) and (ii)(A). N.L.R.B. v. Milk Drivers and Dairy Employees Local Union No. 584, 341 F.2d 29, 33 (C.A. 2, 1965).

Because an object of the work stoppages and threats of further work stoppages was to force Santini to cease doing business with its independent contractors who would not join the Union, such conduct was a

violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

CONCLUSIONS OF LAW

1. The long distance moving contractors with Santini are independent contractors and not Santini employees.

2. By engaging in, and inducing and encouraging employees of Santini to engage in, work stoppages, and by threatening, coercing, and restraining Santini by means of work stoppages and threats of additional work stoppages, with an object of forcing Santini to enter into and give effect to an agreement prohibited by Section 8(e) of the Act and with an object of forcing the independent contractors of Santini and their employees to become members of the Union and with an object of requiring Santini to cease doing business with its independent contractors if they do not become members of the Union, the Union has engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(A) and (B) of the Act.

3. By entering into and giving effect to an agreement with the Union whereby Santini agreed to refrain from doing business with its independent contractors in contravention of Section 8(e) of the Act, the Union and Santini have engaged in unfair labor practices in violation of Section 8(e) of the Act.

4. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It will be recommended that the Union and Santini cease and desist from engaging in the unfair labor practices, and take certain affirmative action designed to effectuate

the policies of the Act. Because of the coercion involved, the affirmative action includes reimbursement of the Santini contractors by the Union for all union initiation fees and dues unlawfully collected from them.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, there is hereby issued the following recommended:

ORDER[30]

A. Respondent Union, Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging employees of Santini or other employer engaged in commerce or in an industry affecting commerce, to engage in a work stoppage, or strike, or refusal in the course of their employment to use or handle any

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30. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

materials or to perform any service, or threatening, coercing, or restraining Santini, or any other employer engaged in commerce or in an industry affecting commerce, where an object thereof is either (1) to force or require Santini or any other employer or person to enter into or give effect to an agreement prohibited by Section 8(e) of the Act, or (2) to force or require the independent contractors of Santini or other employer or self employed person to join the Union or other labor organization, or (3) to force or require Santini to cease doing business with its independent contractors.

(b) Entering into, giving effect to, or enforcing the agreement, article 24 of its collective-bargaining contract (1971-74) to which Santini is party, found unlawful under Section 8(e) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in its business offices, meeting halls, and places where notices to members are customarily posted, copies of the attached notice marked "Appendix A."[31] Immediately upon receipt of said notice, on forms to be provided by the Regional Director for Region 2, the Union shall cause

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31. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the copies to be signed by one of its authorized representatives and posted, the posted copies to be maintained for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily displayed. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail or deliver additional signed copies of said notices to the Regional Director for posting by Santini, if willing, at locations where notices to its employees are customarily posted.

(c) Reimburse the contractors of Santini, or any employees of such contractors, for all initiation fees, dues, or other moneys each may have been required to pay to the Union by reason of the enforcement of the unlawful article 24 of the Union's collective-bargaining contract to which Santini is party. Reimbursement shall include interest at the rate of 6 percent per annum, added to the sum due each, computed on the basis of separate calendar quarters with interest to begin running as of the last day of the calendar quarter for initiation fees, dues, or other moneys exacted or due in that calendar quarter, until compliance with this reimbursement order is achieved.

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Union has taken to comply herewith.

B. Respondent Santini Brothers, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, giving effect to, or enforcing the agreement,

article 24 of the collective-bargaining contract with the Union (1971-74) to which contract Santini is party, found unlawful under Section 8(e) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its places of business copies of the attached notice marked "Appendix B."[32] Immediately upon receipt of said notice, on forms to be provided by the Regional Director for Region 2, Santini shall cause the copies to be signed by one of its authorized representatives and posted, the posted copies to be maintained for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Santini to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 2, in writing within 20 days from the date of this Order, what steps Santini has taken to comply herewith.

32. See fn. 31, supra.

APPENDIX B

INITIAL DECISION
OF THE COURT OF APPEALS

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, et al., Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent, Karl J. Leib, Jr., Intervenor.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

SANTINI BROTHERS, INC., Respondent.

Nos. 74-1036, 74-1243.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 15, 1975.

Decided April 30, 1975

512 F.2d 564.

Before BAZELON, Chief Judge, and TAMM and ROBB, Circuit Judges.

Opinion PER CURIAM.

Opinion filed by Chief Judge BAZELON, concurring in part and dissenting in part.

PER CURIAM:

This case involves a determination by the National Labor Relations Board (the

Board) that Local 814 of the Teamsters Union violated sections 8(b)(4) and 8(e) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(4) and 158(e) (1970), by entering into and attempting to enforce a provision of its collective bargaining agreement with Santini Brothers, Inc. For the reasons stated herein, we remand the record for clarification.

Prior to 1948, movers of household goods and office furniture in the New York metropolitan area utilized employees represented by Local 814 of the Teamsters Union to perform all aspects of their business. However, in that year, a large interstate moving company began utilizing "owner-operators" for so-called long distance hauling, moves in excess of 500 miles. The owner-operators own the tractors that pull the trailers used in long distance moving, contract with the moving companies for hauling business and generally lease the trailers from the company. This method of performing long distance hauling proved attractive to both drivers and companies, and presently, the twenty New York area carriers that perform the bulk of long distance hauling use owner-operators. Santini Brothers, Inc., one of the largest movers in that area, began using owner-operators in 1962 to counteract the deterioration in its long distance moving business as its best drivers became owner-operators for competitors; by 1967, Santini used owner-operators for virtually all of its long distance moving.

Local 814's concern with the practice of using owner-operators first manifested itself in the 1962-1965 collective bar-

gaining agreement between the union and the Moving and Storage Industry of New York, a multi-employer bargaining unit representing approximately 300 area moving and storage companies including Santini. This agreement, and subsequent contracts through 1971, provided that: "the owner-operator, commission of percentage method of operation shall not be practiced on local work covered by this agreement. The percentage or commission method of operation shall likewise not be practiced on long distance moving." These agreements also provided for joint study to explore the effects of utilizing owner-operators for long distance hauling.

In the 1971 negotiations between the union and the industry, the union demanded that all persons involved in long distance moving be treated as employees under the contract, regardless of whether they had been defined as owner-operators. From initial opposition, the employers acceded to the union's demands, accepting the following provision in Article 24 of the agreement.

> A.1. All persons performing long distance driving under contract to an employer covered by this agreement (whether as "owner-operator," "percentage driver," "commission driver," or otherwise) shall be covered by this agreement as employees (hereinafter referred to as contract employees).

Since the collective bargaining agreement contained a union security clause, the effect of this provision was to require that the owner-operators join Local 814

or lose their contracts.

The union sought to enforce Article 24 in the spring and summer of 1972 by advising Santini that it was violating the agreement and by notifying the owner-operators that they were required to join the union. On October 30, 1972, Local 814 engaged in a work stoppage to protest Santini's failure to implement Article 24. The work stoppage ended only after Santini's President agreed to transmit signed membership applications from the owner-operators as he obtained them and to forbid nonsigners to load or unload in the New York metropolitan area. Several owner-operators refused to apply for membership. Thereafter, Santini allowed those who joined Local 814 to load and unload in New York, but not those who refused to join.

On November 8, 1972, Karl J. Lieb, on behalf of several owner-operators, filed unfair labor practice charges against Local 814 and Santini.[1] On June 29, 1973,

1. On November 10, 1972, the Union requested that Santini discharge 13 owner-operators for not joining the Union and paying dues. Santini refused and another work stoppage occurred on November 20. On January 22, 1973, the Board's Regional Director sought a preliminary injunction against the Union under section 10(1) of the Act, 29 U.S.C. §160(1)(1970). The injunction was granted on March 16, 1973. Danielson v. Local 814, Teamsters, 355 F. Supp. 1293 (S.D.N.Y. 1973).

an Administrative Law Judge (ALJ) found that Local 814 had violated the "secondary boycott" provisions of the National Labor Relations Act[2] and that Local 814 and Santini had entered into an illegal agreement because Article 24 was a prohibited "hot cargo" clause.[3] On January 8, 1974, the Board affirmed this decision without comment. Local 814, Teamsters (Santini Brothers, Inc.) 208 NLRB No. 22 (1974).

By adopting the ALJ's opinion, the Board held that the owner-operators were not employees within the meaning of section 2(3) of the Act, 29 U.S.C. §152(3) (1970), but rather were "independent contractors." Therefore, the Board concluded that Article 24 itself and the union activity aimed at enforcing Article 24 were directed at forcing Santini to engage in conduct prohibited by the Act, specifically to coerce the independent contractors to join the union or to cease doing business with them.

Local 814 contends initially that the Board erred in concluding that the union violated sections 8(b)(4) and 8(e) of the Act, for even if the owner-operators were independent contractors, Article 24 is a

2. Section 8(b)(4)(i), (ii)(A), (B), 29 U.S.C. §158(b)(4)(i), (ii)(A), (B) (1970).

3. Section 8(e), 29 U.S.C. §158(e) (1970).

legitimate work preservation clause.[4] We cannot agree. As written, Article 24 neither establishes union work standards for the subcontracting of work nor requires that specific work be done by members of the bargaining unit. Rather, Article 24 purports to require the owner-operators to join the union by defining them as "employees," and hence subjecting them to the union security agreement. If Article 24 were drafted to require that only members of Local 814 may engage in long distance hauling or that any subcontracting to owner-operators must be considered with union work standards, the case would be much different. However, the provision before us is clearly a union signatory agreement violative of sections 8(b)(4) and 8(e) if the owner-operators are not "employees."[5]

4. See National Woodwork Mfg. Ass'n. v. N.L.R.B., 386 U.S. 612, 87 S. Ct. 1250, 18 L.Ed. 2d 357(1967); Orange Belt Dist. Council No. 48 v. N.L.R.B., 117 U.S.App. D.C. 233, 328 F.2d 534 (1964).

5. See Local 1288, Retail Clerks v. N.L. R.B., 129 U.S.App.D.C. 92, 390 F.2d 858, 861-62 (1968); A. Duie Pyle, Inc. v. N.L. R.B., 383 F.2d 772, 777-78 (3rd Cir. 1967), cert. denied, 390 U.S. 905, 88 S.Ct. 819, 19 L.Ed.2d 871 (1968); cf. Denver Bldg. & Constr. Trades Council v. N.L.R.B., 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed., 1284 (1951); Marriot Corp. v. N.L.R.B., 491 F.2d 367 (9th Cir.), cert. denied sub nom. International Ass'n of Machinists v. N.L. R.B., 419 U.S. 881, 95 S.Ct. 146, 42 L.Ed. 2d 121 (1974); Local 710, Meat & Highway

As to this question, the Board adopted the opinion of the ALJ, which concluded that the owner-operators were not employees within the meaning of section 2(3) of the National Labor Relations Act. However, shortly thereafter, the Board also adopted the decision of another ALJ in

5. (cont.) Drivers v. N.L.R.B., 118 U.S. App.D.C. 287, 335 F.2d 709 (1964); Local 5, Plumbers & Pipefitters v. N.L.R.B., 116 U.S.App.D.C. 100, 321 F.2d 366 (1963), cert. denied, 375 U.S. 921, 84 S.Ct. 266, 11 L.Ed.2d 165 (1964); District No. 9, Machinists v. N.L.R.B., 114 U.S.App.D.C. 287, 315 F.2d 33, 36 (1962); Washington Oregon Shingle Weavers Dist. Council, 101 N.L.R.B. 1159 (1952), aff'd, 211 F.2d 149 (9th Cir. 1954). See also N.L.R.B. v. Local 825, Operating Eng'rs, 400 U.S. 297, 91 S.Ct. 402, 27 L.Ed.2d 398 (1971). Of course, if the owner-operators were "employees" (and thus presumably within the union's jurisdiction and certification), then the union's actions are permissible attempts to enforce a union security agreement on its unit employees. Absent state law to the contrary, union security agreements are permitted under present law subject to certain restrictions. NLRA §§ 8(a)(3), (b)(2), (5), 14(b), 29 U.S.C. §§ 158(a)(3), (b)(2), (5), 164(b) (1970). On the relationship of a finding of "independent contractor" status and a finding of a violation of the secondary boycott provisions of the NLRA, see Local 417, Carpet Layers v. N.L.R.B., 151 U.S.App. D.C. 338, 467 F.2d 392, 399-401, 404-06 (1972).

Local 814, Teamsters (Molloy Brothers Moving and Storage, Inc.), 208 N.L.R.B. No. 43 (1974), which concluded that owner-operators who contracted with another member of the Moving and Storage Industry of New York were employees within the meaning of the Act. We believe the two decisions are factually similar and ostensibly inconsistent. Because the Board has not explained its reasons for reaching different results,6 see Greater Boston Television Corp. v. F.C.C.,143 U.S.App.D.C. 383, 444 F.2d 841, 850-52 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971), we remand the record for clarification. If the Board finds the two indistinguishable, it should so inform the court. See N.L.R.B. v. Metropolitan Life Insurance Co., 380 U.S. 438, 442, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965).

Chief Judge Bazelon dissents from the scope of this remand, arguing that it can only produce a post hoc rationalization for the Board's actions. We cannot agree. This court has continually stressed that we are partners with, rather than adversaries to, the administrative agencies. See, e.g., Greater Boston Television Corp., v. F.C.C., supra, 444 F.2d at 851. As

6. The Administrative Law Judge in Santini Brothers, although cognizant of his colleague's position in Molloy Brothers, did not attempt to distinguish the two cases.

such, we think it only fair to give the agency a full and frank opportunity to explicate its actions before we consider reversal. While the possibility exists that the agency will offer a post hoc rationalization, that possibility also exists under Judge Bazelon's broader proposal. Indeed, we believe that Judge Bazelon's proposal would heighten the possibility that the agency might substitute rationalization for reasoning, since his call for a "thorough reconsideration of the doctrinal quicksand in this area" would place the court firmly in an adversary position to the Board.

Moreover, we cannot agree with the dissent's characterization of the circumstances under which the remand for clarification may be utilized. Most recently, this device was utilized in Local 441, IBEW v. N.L.R.B. 167 U.S.App.D.C. 53, 510 F.2d 1274 (1975) the division sought clarification, inter alia, of the Board's position concerning the legal effect of the conduct at issue. We therefore believe that the remand for clarification remains a useful and appropriate device for determining that an agency has engaged in reasoned decision making.

So ordered.

BAZELON, Chief Judge (concurring in part, dissenting in part):

I agree that Article 24 is not a work preservation agreement but rather a union signatory agreement. The validity of the Board's decision thus turns on whether it properly adopted the finding of the Administrative Law Judge that the owner-

operators of Santini were "independent contractors" and not "employees". On consideration of that issue, I find myself in a maze of precedents with few standards for decision discernible. I, of course, note that Congress has quite clearly commanded that the common law definition of "independent contractor" be the basic guide for distinguishing between "employees" and "independent contractors."[1] This does not mean that considerations of labor policy are irrelevant[2] but that they be considered in light of the common law test of "control". Under this test the degree of control which an employer exercises over a worker determines whether the worker is an "employee" or an "independent contractor."[3] How great a degree of control must exist, how that control is to be

1. See NLRB v. United Ins. Co. of America, 390 U.S. 254, 256 & n.2, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968); Joint Council No. 42, Teamsters v. NLRB, 146 U.S.App.D.C. 275, 450 F.2d 1322, 1326 (1971) and legislative history cited.

2. See Carnation Co. v. NLRB, 429 F.2d 1130, 1132 (9th Cir. 1970). For this reason I do not find Harrison v. Greyvan Lines, Inc., 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947) controlling.

3. Joint Council No. 42, Teamsters v. NLRB, 146 U.S.App.D.C. 275, 450 F.2d 1322, 1326 (1971), citing Grace v. Magruder, 80 U.S.App.D.C. 53, 148 F.2d 679, 681 (1945); Restatement of Agency (Second) § 220(1), (2) (1957). See NLRB v. Cement Transport, Inc., 490 F.2d 1024, 1027 (6th Cir. 1974); Ace Doran Hauling & Rigging Co. v. NLRB,

quantified and how various incidents of control are to be weighed comparatively

3. (cont.) 462 F.2d 190, 193 (7th Cir. 1972); News-Journal Co. v. NLRB, 447 F.2d 65, 68 (3d Cir. 1971); Carnation Co. v. NLRB, 429 F.2d 1130, 1134 (9th Cir. 1970); Frito-Lay, Inc. v. NLRB, 385 F.2d 180. 187 (7th Cir. 1967); NLRB v. A. S. Abell Co., 327 F.2d 1, 4 (4th Cir. 1964); Deaton Truck Line, Inc. v. NLRB, 337 F.2d 697, 698-99 (5th Cir. 1964), cert. denied sub nom. Local 612, Teamsters v. NLRB, 381 U.S. 903, 85 S.Ct. 1448, 14 L.Ed.2d 285 (1965).

While there can be no doubt that Congress intended this "right of control" test to apply, I am impressed by the suggestion of counsel for Local 814 that the better test is one which determines "employee" status on the basis of whether the contested workers are properly represented by the relevant union. This is, I take it, a test virtually identical to the test of whether certain workers belong in the jurisdiction of one union or are part of an appropriate bargaining unit which the union represents. See, e.g., NLRB v. Radio & Television Broadcast Eng'rs., 364 U.S. 573, 81 S.Ct. 330 5 L.Ed.2d 302 (1961); Mallinckrodt Chem. Works, 162 N.L.R.B. No. 48 (1966). Cf. NLRB v. Southern Seating Co., 468 F.2d 1345, 1347-48 & n.8 (4th Cir. 1972) (distinction between a "supervisor" and an "employee"). The § 7 rights of the workers in dispute may be protected through Labor Board policy on "accretion" to existing units. See Local 455, Retail Clerks v. NLRB, 166 U.S.App. D.C. 422 at 425 & n.2, 510 F.2d 802, 805 & n.12 at 6 & n.12 (1975).

are questions left unanswered by Congress and by the Board in its various efforts in this area. We are, however, required to defer to the Board's determination if that determination involves a reasonable choice among competing considerations.[4]

The competing considerations in this case are as follows. On the side of "independence", I notice that the owner-operators own their own "tools", the tractor cab; that they are paid by the job and not by the hour; that they receive no workmen's compensation or retirement benefits; that they are responsible for all costs associated with hauling, including repairs and maintenance, road taxes, living expenses, damage insurance, and packing materials; that they may refuse loads and may determine their routes once they accept a load; and that they may hire their own assistants to aid in loading and driving.[5] On the other hand, in favor of

4. See NLRB v. United Ins. Co. of America, 390 U.S. 254, 260, 88 S.Ct. 988, 19 L.Ed. 2d 1083 (1968).

5. On the legal significance of these factors, see Harrison v. Greyvan Lines, Inc., 331 U.S. 704, 708, 716-19, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947); Joint Council No. 42, Teamsters v. NLRB, 146 U.S.App. D.C. 275, 450 F.2d 1322, 1327-29 (1971); Carnation Co. v. NLRB, 429 F.2d 1130, 1132 (9th Cir. 1970); Associated Independent Owner-Operators, Inc. v. NLRB, 407 F.2d 1383, 1385-87 (9th Cir. 1969); National Van Lines, Inc. v. NLRB, 273 F.2d 402, 406-07 (7th Cir. 1960); Reisch Trucking & Transportation Co., 143 N.L.R.B. 953 (1963).

employee status, I find that the "tools", the tractor cab, is leased exclusively to Santini and the driver has no right to use it on jobs other than with Santini; that the payment by the job is largely dependent on set rates established by the ICC, the driver receiving a variable percentage depending on what services he performs; that the owner-operator by custom if not by contract works only for Santini and does not drive for other carriers[6]; that

6. Under some, older agreements between Santini and the owner-operators, such as that with Marvin Baggett, Exhibits at 481, 484, and Thomas Wolfe, id. at 468, 471, the owner-operator was subject to termination for driving for another carrier. This provision has been dropped from the newer agreements executed with some drivers at or after the time of the unfair labor practices here in dispute, Exhibits at 38-43, as in the contract with Thomas Wolfe, id. at 450-67. However, even under the newer agreements covering part of Santini's drivers the owner-operator is required to operate his own vehicle and is also required to notify Santini of any carrier business the owner-operator discovers and to permit Santini to have the right of first refusal of that business. Exhibits at 452-53. Furthermore, it seems inherently persuasive that an owner-operator would want to operate his own equipment and would consider himself bound to it. The Administrative Law Judge apparently found that the owner-operators, if they wished to work overtime, can drive for other carriers with Santini's permission (one assumes as "moonlighting"). Joint App. at 21 n.14.

Santini requires driver compliance with workmen's compensation laws, requires certain kinds of liability insurance, requires a deposit of $3,000 to insure driver compliance with various safety and other regulations; that loads must be delivered within a set time; and that Santini's arrangements with United Van Lines require the owner-operators working on United jobs to attend United driver training school and to follow the United drivers' manual.7 Perhaps more important

7. United and Santini have three different types of business arrangements variously called "permanent" lease; "master" lease and "peak" lease. Virtually all of Santini's 24 owner-operators work on United jobs under one of these business arrangements. Local 814, Teamsters (Santini Bros.), 208 N.L.R.B. No. 22 (1974), Joint App. at 13 (opinion of ALJ). These lease arrangements all require Santini to provide personnel for United jobs who comply with all of United's business rules. Exhibits at 648, 651. United promulgates a variety of rules through its owner's manual which is reprinted in Exhibits at 789-948. One of the rules contained in the owner's manual is that the driver must attend the United training school, if he is on a so-called "permanent" lease, as are 9-10 of Santini's drivers, id. at 792. The older agreements between Santini and its owner-operators, many of which were still in effect at the time of the unfair labor practices, Exhibits at 38-43, expressly required the owner-operators to follow the rules in the United manual. Exhibits at 471, 484. The new agreements eliminate this express provision, id. at

7. (cont.) 450-67, but the provisions in the contracts between Santini and United remain the same and it is reasonable to expect that United still expects to have drivers who comply with United rules. Apparently the practice is that if United is unhappy with any Santini drivers because of failure to live up to United's expectations, the driver is simply taken off United business, cf. Local 814, Teamsters (Santini Bros.), supra, Joint App. at 27, but since virtually all of Santini's owner-operators work on United jobs, one may assume either total compliance with United rules or termination by Santini of offending drivers under the newer agreements' termination clause, Exhibits at 464 (termination at will of Santini on thirty days notice). The Administrative Law Judge made no findings on the effect of the owner's manual or on the effect of the newer agreements on United's right to enforce the provisions of the manual. There was testimony in the record that Santini has no record of distributing the United manual and no policy of enforcing it (although we may assume that Santini would affirmatively respond to a United complaint about a particular driver), but as is noted in note 13 infra, it is the right of control and not the actual exercise of the right which is central to the legal definition of "employee". Absent further explanation from the Labor Board, I think it established that United through Santini has at least the right of control on the basis of the requirements of the owner's manual.

than all of these factors is the pervasive government regulation of interstate hauling with the attendant rules and procedures imposed upon the licensed carrier (here Santini) and through the carrier on the owner-drivers.[8] Santini, of course, requires that its owner-drivers comply with government regulations. It is not immediately clear to me which way these regulations count, toward "independence", toward "employee" status or neutral on the question of independence.[9]

8. The various governmental regulations promulgated by the ICC and the Department of Transportation relates to safety, accident reporting, vehicle inspection, use of drugs or alcohol, logging requirements, a carrier (Santini)-imposed exclusive lease on the owner-operator's tractor cab and the shipper's rates which define the owner-operator's compensation. Santini, as the licensed carrier, is responsible for the performance of these duties and may not delegate its responsibility to the owner-operator. See Local 814, Teamsters (Santini Bros.), 208 N.L.R.B. No. 22 (1974), Joint App. at 25-26 (opinion of ALJ).

9. See NLRB v. Cement Transport, Inc. 490 F.2d 1024, 1027 (6th Cir. 1974); Ace Doran Hauling & Rigging Co. v. NLRB, 462 F.2d 190, 194 (6th Cir. 1972). See also NLRB v. Pony Trucking, Inc., 486 F.2d 1039, 1040 (6th Cir. 1973); Aetna Freight Lines, Inc. 194 N.L.R.B. 740, 741 (1971) (Miller, Member, concurring).

I note one argument drawn from the national labor policy which supports the Board's position. Here the union sought to impose economic sanctions on an employer to force the employer to coerce employees not members of the union to join the union. This is not a case where a group of employees has joined a union and seeks to bargain with the employer. Thus, the definition of "employee" in this case - in a manner unlike a case where the workers seek to bargain after joining a union - involves the § 7 rights of the relevant workers.[10] The Taft-Hartley Act in its essential structure operates to proscribe efforts by unions to garner jurisdiction over employees without a free choice on their part to forego individual bargaining and embrace collective bargain-

10. 29 U.S.C. §157 (1970) ("Employees ... shall also have the right to refrain from" collective bargaining). Cf. §§ 8(b)(1), 14(b), 29 U.S.C. §§ 158(b)(1), 164(b) (1970); International Ass'n of Machinists v. Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); NLRB v. Exchange Parts Co., 375 U.S. 405, 84 S.Ct. 457, 11 L.Ed.2d 435 (1964); Local 633, Teamsters v. NLRB, 166 U.S.App.D.C. 157, 509 F.2d 490, 493 (D.C.Cir. 1974). This § 7 right is most profoundly evident in the secondary boycott prohibition as that prohibition has developed over the years.

ing.[11] Article 24, which operates as a union signatory agreement, is in derogation of this central policy of Taft-Hartley. With this in mind, the union's charge that Santini and the owner-operators have deliberately drawn their agreements to avoid "employee" status is transformed into a powerful argument against the union's position, viz. that the owner-operators exercising their § 7 right not to join a union have opted instead for individual bargaining. The union's apparent remedy under the structure of the NLRA is to organize the owner-operators, to force an alteration in the contracts between the operators and Santini and thereby create an "employee" status. To do this, of course, the union must obtain the consent of the owner-operators which apparently it does not have. The union's attempt to create "employee" status through pressure on the employer to cause indirect pressure on the owner-operators finds no support in national labor policy.

11. See S.Rep. No. 105, 80th Cong., 1st Sess. 5-7 and passim (1947). Numerous provisions in the newer agreements between Santini and the owner-operators state expressly an intention to avoid collective bargaining. Most obvious is the provision that states it is the intent of the contracting parties that the owner-operator is to be an independent contractor. Exhibits at 463; see id. at 450-67.

This argument is, however, defeated for the present by an apparent inconsistency between the Board's decision in this case and in the closely related case of Molloy Brothers Moving and Storage.[12] Molloy also involved Local 814 and the Moving and Storage Industry of New York, and particularly concerned whether the owner-operators of Molloy were employees or independent contractors. An Administrative Law Judge different from the one that decided this case held that the Molloy owner-operators were employees and not independent contractors. The Board also affirmed Molloy without opinion. There is no apparent distinction between Molloy and the case sub judice. While there was more evidence in Molloy of owner-operator compliance with work rules promulgated by Allied Van Lines with whom Molloy Brothers were affiliated, the extent of Molloy's right of control[13] was no larger than

12. Local 814, Teamsters (Molloy Bros.), 208 N.L.R.B. No. 43 (1974) decided nine days after the Santini case.

13. It is the right of control and not the exercise of that right which is relevant to a finding of independent contractor status. See NLRB v. Cement Transport, Inc., 490 F.2d 1024, 1027 (6th Cir. 1974); Joint Council No. 42, Teamsters v. NLRB, 146 U.S.App.D.C. 275, 450 F.2d 1322, 1326 (1971); Carnation Co. v. NLRB, 429 F.2d 1130, 1134 (9th Cir. 1970); NLRB v. A.S. Abell Co., 327 F.2d 1, 4 (4th Cir. 1964). The Administrative Law Judge in the Santini case paid very little attention to the United owner's manual whereas the

Santini's and both extended well beyond the requirements of government regulation through use of drivers' manuals. The Board in its brief suggests that Molloy's health insurance plan and a profit-sharing plan serve to distinguish it from Santini. I do not think, in the absence of Board explanation, that these two relatively minor distinctions are sufficient to justify different results. I further note that the Board's decisions in general on the status of truck drivers who own their vehicles seem difficult to reconcile.[14]

13. (cont.) Administrative Law Judge in Molloy found that the Allied owner's manual was the source of a number of carrier restrictions over and above that required by the government. Local 814, Teamsters (Molloy Bros.), 208 N.L.R.B. No. 43 (1974), at 6-8 & n.7 (opinion of ALJ). In Molloy the Administrative Law Judge also relied on various Allied bulletins; there is evidence of various United bulletins in the record sub judice. Exhibits at 949-50, 977-79, 982-83, 988-99, 1007-15b. This seems to be the source of inconsistency.

14. Compare Reisch Trucking & Transportation Co., 143 N.L.R.B. 953 (1963); Fleet Transport Co., 196 N.L.R.B. 436 (1972); Conley Motor Express, Inc., 197 N.L.R.B. No. 57 (1972); Gold Metal Baking Co., 199 N.L.R.B. No. 132 (1972); Portage Transfer Co., 204 N.L.R.B. No. 117 (1973); George Transfer & Rigging Co., 208 N.L.R.B. No. 25 (1974) with Deaton, Inc., 187 N.L.R.B. 780 (1971); Aetna Freight Lines, Inc., 194 N.L.R.B. 740 (1971); Florida Texas Freight, Inc., 197 N.L.R.B. No. 158 (1972);

The requirement of a reasoned decision is central to judicial review of administrative action. Fulfillment of this requirement mandates an agency to reconcile within reason its precedents and to avoid inconsistent decisions.[15] The urgency of

14. (cont.) Pony Trucking, Inc., 198 N.L.R.B. No. 59 (1972), aff'd, NLRB v. Pony Trucking, Inc., 486 F.2d 1039 (6th Cir. 1973). See also the various determinations of the Courts of Appeal, NLRB v. Cement Transport, Inc., 490 F.2d 1024 (6th Cir. 1974); Ace Doran Hauling & Rigging Co. v. NLRB, 462 F.2d 190 (6th Cir. 1972); Joint Council No. 42, Teamsters v. NLRB, 146 U.S.App.D.C. 275, 450 F.2d 1322 (1971); Associated Independent Owner-Operators, Inc. v. NLRB, 407 F.2d 1383 (9th Cir. 1969); Maxwell Co. v. NLRB, 414 F.2d 477 (6th Cir. 1969); Deaton Truck Lines, Inc. v. NLRB 337 F.2d 697 (5th Cir. 1964), cert. denied sub nom. Local 612, Teamsters v. NLRB, 381 U.S. 903, 85 S.Ct. 1448, 14 L.Ed.2d 285 (1965); National Van Lines, Inc. v. NLRB, 273 F.2d 402 (7th Cir. 1960). Cases involving the status of distributors involve different problems and hence are distinguishable. See, e.g., NLRB v. Pepsi Cola Bottling Co. of Mansfield, 455 F.2d 1134 (6th Cir. 1972); News-Journal Co. v. NLRB, 447 F.2d 65 (3d Cir. 1971); Herald Co. v. NLRB, 444 F.2d 430 (2d Cir. 1971).

15. See NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 442, 85 S.Ct.1061, 13 L.Ed.2d 951 (1965) (Goldberg, J.); NLRB v. Gibson Products Co., 494 F.2d 762, 767 (5th Cir. 1974); May Department Stores Co.

this requirement is underscored when an agency is charged with administering a broad statutory mandate - such as we confront here - and when courts must by necessity defer to the agency judgment. In this case, I face conflicting decisions of Administrative Law Judges, decisions which the Labor Board has chosen to affirm without opinion. These conflicting decisions exist against a background of barely reconcilable precedents and of a failure of the Labor Board to provide a reasoned basis for its decisions regarding the definition of "employee."

15. (cont.) v. NLRB, 454 F.2d 148, 151 (1972); Carnation Co. v. NLRB, 429 F.2d 1130, 1134 (9th Cir. 1970); cf. Barrett Line, Inc. v. United States, 326 U.S. 179, 65 S.Ct. 1504, 89 L.Ed. 2128 (1945), discussed L. Jaffe, Judicial Review of Administrative Action 586-88 (1965); Secretary of Agriculture v. United States, 347 U.S. 645, 74 S.Ct. 826, 98 L.Ed. 1015 (1954); Columbia Broadcasting System, Inc. v. FCC, 147 U.S. App.D.C. 175, 454 F.2d 1018, 1026-27 (1971); Marco Sales Co. v. FTC, 453 F.2d 1, 7 (2d Cir. 1971); Mesa Petroleum Co. v. FPC, 441 F.2d 182, 192 (5th Cir. 1971); Melody Music, Inc. v. FCC, 120 U.S.App.D.C. 241, 345 F.2d 730 (1965); City of Lawrence v. CAB, 343 F.2d 583 (1st Cir. 1965). See generally Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841, 850-52 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).

The Court decides to remedy the situation by remanding the record for supplementation on the issue of the inconsistency between Molloy and the case sub judice. I agree that the Board must develop a distinction between the cases before this Court may affirm its decision, but I do not think that a remand of the record alone is, on the facts of this case, a sufficient remedy for the Board's failure to provide a reasoned decision of this case. This case in my view presents a classic example of where a diligent reviewing court could determine through a variety of factors that the agency had not given the problem a "hard look", Greater Boston Television Corp. v. FCC, 143 U.S. App.D.C. 383, 444 F.2d 841, 850-52 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971). A remand of the record alone can produce only a post hoc rationalization of the inconsistency between Molloy and this case. Such post hoc rationalizations have been consistently held to be inadequate to justify an otherwise vulnerable decision.16 The reason of

16. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); cf. FPC v. Texaco, Inc., 417 U.S. 380, 397 (1974); NLRB v. Local 347, Food Store Employees, 417 U.S. 1, 9-10, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974).

There is nothing in Local 441, Electrical Workers v. NLRB, 167 U.S.App.D.C. 53, 510 F.2d 1274 (1975) which is to the contrary. That case involved a remand

this rule is that an agency might simply search for an explanation, in this case a distinction, to satisfy the requirement of a reasoned decision, regardless of whether the agency would have been genuinely impressed with the explanation or distinction if the matter were properly considered in the first instance. The wisdom of this rule is particularly evident when the agency's error is the failure to give a "hard look" in the first place. Indeed, post hoc rationalizations are hardly the instrument to develop the standards for decision which are so conspicuously lacking in this area. It is my understanding that the record should be remanded for supplementation only when there are minor factual confusions or conflicts within an agency decision. I know of no authority for the proposition that the record may be remanded for supplementation when the agency has failed to comply with the requirement of a reasoned decision. I would reverse the Board and remand for a thorough reconsideration of the doctrinal quicksand in this area.

16. (cont.) because of a confusion in the Board's handling of a conflict in testimony and the legal implications to be drawn therefrom. As such, a confusion in testimony, it was clearly proper to remand for supplementation of the record. The case sub judice, on the other hand, concerns a failure to supply a reasoned decision. Such failures may not be rectified by a remand of the record alone.

APPENDIX C

SUPPLEMENTAL DECISION OF THE NLRB

UNITED STATES OF AMERICA

BEFORE THE NATIONAL
LABOR RELATIONS BOARD

LOCAL 814, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA (Santini Brothers,
Inc.)

and Case 2--CC--1247

KARL LEIB, JR., ESQ.

LOCAL 814, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

and

SANTINI BROTHERS, INC.

and Case 2--CE--52

KARL LEIB, JR., ESQ.

SUPPLEMENTAL DECISION AND ORDER

On January 8, 1974, the National Labor Relations Board issued its Decision and Order[1] herein which adopted the Decision of Administrative Law Judge Herzel H.E. Plaine, who found, inter alia, that the owner-operators are independent contractors.

1/ 208 NLRB 184

On April 30, 1975, the United States Court of Appeals for the District of Columbia[2] expressed its belief that the Board's Decision and Order in the instant proceeding and in Molloy [3] both of which deal with the status of owner-operators, are "factually similar and ostensibly inconsistent." The court therefore remanded the instant proceeding for "clarification" by the Board.

Thereafter, the Board issued a notice to the parties requesting that they file statements of position with respect to the matters raised by the court's remand. The Union and the Charging Party have filed responses thereto.

Upon consideration of the issues set forth by the court and in light of the entire record in this proceeding, including the parties' statements of position, we make the following findings:

2/ Local 814, International Brotherhood of Teamsters, Cauffers, Warehousemen and Helpers of America (Santini Brothers, Inc.) v. N.L.R.B., 512 F.2d 564.

3/ Local 814, International Brotherhood of Teamsters, Cauffeurs, Warehousemen and Helpers of America (Molloy Brothers Moving and Storage, Inc.), 208 NLRB 276 (1974).

As indicated above, the Board in the instant proceeding adopted the Decision of Administrative Law Judge Plaine, who concluded that the owner-operators of Santini, a member of the moving and storage industry of New York, are not employees within the meaning of Section 2(3) of the Act. However, on the following day, the Board also adopted the Decision of Administrative Law Judge Sidney Sherman in Molloy, supra, who concluded that the owner-operators of Molloy, another member of the moving and storage industry of New York, are employees within the meaning the Act.

In deciding whether owner-operators in each particular case are independent contractors or employees, the Board has often stated that it will apply the right-of-control test and in doing so will take into account all the factors bearing on their status. Thus, although the owner-operators in Santini are subject to ICC (Interstate Commerce Commission) and DOT (Department of Transportation) regulations, which require Santini to exercise control over such matters as safety checks and the health and qualifications of the owner-operators, Administrative Law Judge Plaine held that, in the absence of other nongovernmental factors which establish extensive control by Santini, the owner-operators are sufficiently free from "carrier direction and supervision of performance" to warrant finding them to be independent contractors. As Administrative Law Judge Plaine correctly observed in this connection, both the Supreme Court and the Board have, over a span of more that 25 years, held in a number of

cases4/ involving the moving and trucking industry that "even in a governmentally regulated business, arrangement(s) for doing business, similar to (those) in (Santini), whereby small businessmen undertake performance of part of the principal function of the larger businessmen...indeed (constitute) independent contracting."

In determining that the owner-operators in Santini are independent contractors, Administrative Law Judge Plaine took cognizance of Administrative Law Judge Sherman's Decision in Molloy and a number of other Board Decisions5/ wherein owner-operators were held to be employees rather than independent contractors. While they, too, involved a "governmentally regulated business," Administrative Law Judge Plaine correctly found they were distinguishable because in Molloy and similar cases, unlike Santini, "there was a layer of carrier regulation put upon the (owner-operators) beyond what was required by governmental regulation, impairing the

4/ See Harrison v. Greyvan Lines, Inc. (Sub nom. United States v. Silk d/b/a Albert Silk Coal Co.), 331 U.S. 704 (1947), and the cases cited by Administrative Law Judge Plaine.

5/ See Pony Trucking, Inc., 198 NLRB 686 (1972), and other cases cited by Administrative Law Judge Plaine.

(owner-operators') independence." Thus, in Molloy, there was "pervasive control over the (owner-operators') mode of operation, particularly their on-the-job training, their procedures in loading and unloading cargo, their dealings with customers, and...such control exceed(ed) governmental requirements to a significant degree."6/

In addition, Santini is distinguishable from Molloy in the following respects:

In Molloy, owners were required to attend training classes where they used as a text a 102-page drivers' manual which was a compilation of the rules established by the owners that have no counterpart in DOT regualtions, whereas here drivers may attend United Van Lines' training program but are not disciplined for failing to do so. 7/ Molloy owners were disciplined for not complying with the various directives, bulletins, and instructions, many of which went beyond the required governmental controls and included procedures for loading and unloading freight, whereas here United's manual suggests procedures for loading cargo, but neither United or Santini supervises the owner-operators when they load, unload, or drive. The Molloy manual listed infractions which were subject to disciplinary action, including discharge, such as preventable accidents,

6/ See Molloy Brothers, supra at 279.

7/ Santini is an agent or franchise representative of United Van Lines.

failing to check out with the Allied dispatcher, failure to report to the Allied agent at destination, refusal to load, misconduct, and dishonesty, whereas here there are no analogous requirements by Santini or United. Santini's owner-operators themselves pay for any health insurance they may carry, whereas Molloy assumed the costs of health insurance for the owners. In Santini, the owners bear the costs and incidents of operation and the Company does not advance trip expenses, whereas Molloy alone bore the risk of any default by a customer in payments for services rendered by owner-drivers, and it advanced trip expenses from a reserve account accumulated from the owner-operators' commissions. Further, in Molloy, the company established a profit-sharing plan for the owners, while in Santini there is no similar arrangement. Only when Santini converted to the contracting method of long-distance moving did it loan the operators money to buy trucks, and these loans were paid off by 1973; in contrast, Molloy has made loans to owners in substantial amounts for various purposes. Finally, Santini has its own operating authority from the Interstate Commerce Commission, whereas Molloy did not and had to depend on Allied Van Lines' certificate.

8/ Molloy is an affiliate of Allied Van Lines.

It is obvious from the above that the controls imposed upon Molloy's owner-operators were much greater than those exercised over the Santini drivers, and that Santini is in sharp contrast to Molloy, in which the facts show "pervasive control" over owner-operators which "exceed(d) governmental requirements to a significant degree." Accordingly, we shall adhere to the Decision and Order in the instant proceeding. 9/

9/ The basic standards for determining employee or independent contractor status are well settled and need not be debated. The issue in each case is the application of those standards to the facts. Our dissenting colleagues set forth at great length their reasons for disagreeing with out conclusions based on those facts, but those "reasons" consist of their own comments concerning what they believe to be the situation rather than what the facts show on their face. For example, their equation of the right of Santini's drivers to refuse to load with impunity with permission for a regular employee to take a day off is strained and meaningless --it is rare, indeed, that blanket prior permission is given to employees to take off without notice or clearance and regardless of the workload.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board affirms its Decision and Order issued in the proceeding on January 8, 1974.

Dated, Washington, D. C., April 7, 1976.

Betty Southard Murphy, Chairman

John A. Penello, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

MEMBERS FANNING AND JENKINS, dissenting:

The Court of Appeals for the District of Columbia remanded this case to us for a clarifying explanation of the reasons for reaching a different result in this case from that in Local 814, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America (Molloy Brothers Moving and Storage, Inc.), 208 NLRB 276 (1974). In adhering to the Board's original decision that Santini's drivers are not employees, our colleagues now conclude that Molloy exercised sufficiently greater control over the long-haul drivers than Santini to justify a different result.

In our view, the basic and significant aspects of the relationship between the

carriers and the long-haul drivers are identical in both Molloy and Santini. The differences in control relied upon by the majority, if they exist, are too inconsequential to warrant the conclusion that the long-haul drivers are employees in Molloy and independent contractors in Santini. We therefore disagree with our colleagues and conclude that the long-haul drivers in Santini, as well as in Molloy, are employees of the carriers and not independent contractors.

Considerable support for this conclusion is provided in the standards applied by the Supreme Court to sustain an employment relationship in N.L.R.B. v. United Insurance Co. of America, 390 U.S. 254 (1968), a case arising under the National Labor Relations Act. The Court disregarded the absence of details of daily supervision and stressed the significance of a number of factors defining the overall relationship which are present here. In concluding that the agents in United Insurance Co. were employees, rather than independent contractors, the Supreme Court noted that (1) "the agents do not operate their own independent business, but perform functions that are an essential part of the company's normal operation"; (2) "they do business in the company's name with considerable assistance and guidance from

10/ Santini's local and short-haul drivers are admittedly employees.

the company and its managerial personnel and ordinarily sell only the company's policies"; (3) the agents' agreement "that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company"; (4) "the agents account to the company for the funds they collect under an elaborate and regular reporting procedure"; and (5) "the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory."

Comparable factors indicative of an employment relationship are present here. The long-haul drivers do not engage in a business of their own, separate and apart from that of Santini. They are an integral part of Santini's long-distance household moving business and on a regular and continuing basis perform all the services of loading, hauling, and unloading the household goods of each of the shippers from the household of origin to the household of destination. The goods are hauled in Santini-owned trailers. The drivers are paid on a commission basis, receiving a percentage of the total moving charges as their compensation. Although the tractors are owned by the drivers, both the tractors and trailers are painted with the name and colors of Santini or its contract associate, United. Not only do the tractors and trailers carry the name of Santini or United, but the goods hauled travel only under bills of lading of Santini or United and the long-haul drivers regularly carry only the loads of Santini or United.

Employees of Santini, without participation by the drivers, inspect the proposed long-distance shipments, estimate their cost, write up orders, arrange for the pickup date, prescribe the delivery time, assemble the proposed moves that will make an appropriate van load, and advise the driver in advance of his arrival in the area of the availability of the load which has been put together by Santini. Upon the driver's arrival, Santini's dispatcher turns over to him the several orders for service and bills of lading that will comprise a load. The driver then proceeds to the homes of the shippers for pickup of the household goods and delivery at destination. The 24 drivers who constitute Santini's long-haul household movers operate under identical agreements whose terms and conditions are prescribed by Santini.11/ Over 90 percent of Santini's household moving is carried out on a C.O.D. basis and the driver is required at destination to collect payment from the shipper and promptly account for payments to the carrier. After effecting delivery, collecting the charges, and remitting them to Santini, the driver indicates to Santini's dispatch office his availability for the next assignment. As noted, he works exclusively for Santini (or United) and does not offer his tractor, painted with Santini's name and colors and pulling Santini's trailer, in the general market for moving services. Although the agreements with the long-haul drivers are terminable by either party on short notice,

11/ Some older agreements, not varying in significant respects, are still in effect.

the long-haul drivers constitute a regular force whose driving arrangements with Santini continue as long as their work is satisfactory.

The foregoing incidents of the long-haul drivers' relationship with Santini parallel many of those found by the Supreme Court to be significant indicators of an employment relationship in the United Insurance Company case and, in our view, should have the same effect here. This conclusion is fortified by the fact that, pursuant to the regulations of the Interstate Commerce Commission and Department of Transportation with which carriers are required to comply, Santini strictly controls nearly every phase of work of the drivers, including maintenance of equipment, hours of service, observance of safety standards, and the keeping of detailed records. The control over the drivers, which regulates every significant aspect of the manner and means of their performance of the long-distance hauling, is no less because it is exercised pursuant to governmental direction. The regulations are imposed upon the carriers and, to remain in business, they are required to control the manner and means of performance by the drivers. Certainly Santini's responsibility to third persons for damages resulting from any breach of these standards would be no less because they are Government imposed. This is the essence of the employment relationship at common law which is controlling here.

Moreover, it would seem that the principal significance of the " manner and means" test in resolving the independent

contractor-employee question is the determination of whether the individual performing services for another has sufficient freedom of action in producing a result for which he has contracted so that he is truly an independent businessman and solely responsible for his conduct. When the manner and means of performance of the agreed work are controlled by the nature of the employer's business, the individual does not have the freedom of an independent businessman and his obligation to comply with the employer's business requirements weighs heavily in favor of an employment relationship.

The drivers' lack of any substantial proprietary interest in the business of moving household goods over long distances, and the absence of any real opportunity for entrepreneurial decisions by which the drivers can measurably influence their profits and losses also point to an employment relationship. Although the individual drivers usually own a tractor which is a physical asset of substantial value, this is not a proprietary interest in the business of long-distance moving. The trailers in which the household goods are hauled, as well as all other physical assets employed to carry on the long-distance moving business, are owned by Santini. But, more importantly, all the goodwill, institutional, and enterprise value resulting from operation of a long-distance moving business for a period of years belongs to Santini. If a driver is terminated or decides to discontinue driving, he has nothing to sell but his tractor. The value of the long-distance moving business remains entirely with

Santini.

Similarly, the drivers' earnings are controlled almost entirely by the amount of business which Santini generates. The drivers' only function is to pick up the loads generated and put together by Santini and deliver them as Santini directs. Santini's activities alone determine the amount of business that will be available and the entrepreneurial character of the drivers' earnings stems almost entirely from Santini's efforts. Under this agreement with Santini, the drivers receive a fixed percentage of the total charge for the move and out of this percentage they pay the expenses of loading, unloading, and operating the moving equipment. Although there may be some variations in these costs with different drivers, there is no evidence of any significant differences in earnings among drivers resulting from management expertise. It is apparent that these costs are fairly well standardized and measureable, are taken into account in fixing the drivers' commission for services, and do not provide any meaningful opportunity for influencing drivers' earnings.

In attempting to distinguish the present case from Molloy, our colleagues perceive greater control in Molloy over the drivers' mode of operation. 12/ In its reliance upon

12/ In this connection, it should be noted that the Administrative Law Judge in Molloy observes that the form of contract with the long-distance drivers currently in use required their compliance only with Government regulations. He further found, (cont.)

differences between Molloy and Santini, the majority refers to Molloy's control over the drivers' mode of operation, particularly their-on-the-job training, their procedures in loading and unloading cargo, and their dealings with customers. It illustrates this claimed greater control by the statement that Molloy drivers are subject to disciplinary action for preventable accidents, failure to check with the carrier's dispatcher, failure to report to the carrier agent at destination, refusal to load, misconduct, and dishonesty. It also refers to the fact that the Santini driver's pay for their own health insurance, do not enjoy a profit-sharing plan, are advanced trip expenses from a reserve account of their commissions, are not disciplined for failing to attend United's training program, and are not supervised when they load, unload, or drive. It noted finally that Molloy had no separate operating authority from the Interstate Commerce Commission and depended on Allied Van Lines' certificate.

12/ (cont.) however, that the earlier form contract which required compliance with additional regulations and instructions of the carriers remained in use to some extend and that, in any event, compliance with various directives, bulletins, and instructions of the carriers was required.

Even if the above factors relied on by the majority represented differences in control over the drivers, we would be unable to agree that they are of sufficient substance to overcome the basic aspects of the relationship which are determinative of an employment situation. But there is a serious question as to whether there are significant differences in the controls exercised by Molloy and Santini over their long-distance drivers even in the respects noted. As to on-the-job training, it is clear that a training program is available for the Santini drivers. The lack of significance of failing to require its drivers to attend the training program is evidenced by Santini's acknowledgement that its long-distance movers are "qualified, experienced drivers." As to loading and unloading, a manual of instructions is available for Santini drivers. But here again one may query whether such direction is necessary for "qualified, experienced drivers." The absence of supervision in loading, unloading, or driving seems similarly meaningless. It does not appear that Molloy has a supervisor present to oversee these operations. Nor can it be assumed that in its local and short-haul moving operations carried out by admitted employees Santini provides additional personnel to supervise its experienced and qualified employee movers. With respect to the items listed as involving disciplinary action by Molloy, it must be remembered that Santini has the authority to terminate drivers on short notice and it is inconceivable that Santini would not exercise this authority when appropriate in the face of preventable accidents,

misconduct, or dishonesty. It is also clear that the Santini drivers check regularly with its dispatchers and agents at destination in carrying out their delivery functions. The privilege of Santini's drivers to refuse a load amounts to little more than allowing a regular employee to take a day off from time to time. Abuses with respect to any of these matters are obviously subject to Santini's right to refuse loads or terminate the driving arrangement.

Provisions for profit sharing, which give Molloy drivers an additional percentage based on volume, and payment for health insurance are merely aspects of compensation and are not significant indicators of an independent contractor or employment relationship. The fact that trip expenses are advanced by Santini from a reserve account of unpaid commissions certainly have little effect in determining whether the drivers are employees. Does the majority assume that Molloy's drivers are always fully paid with no commission balances ever owing them? How the fact that "unlike Santini, Molloy has no separate operating authority from the Interstate Commerce Commission" increases the controls Molloy has over its long-distance drivers is not explained by the majority nor readily apparent.

The majority asserts that our dissent is based upon our disagreement with the application of well-settled standards to the facts and our refusal to accept "what the facts show on their face." Our quarrel with the majority, however, is not confined to the application of agreed-upon

standards. We believe the majority is applying erroneous standards and this is evidenced by the inconsequential factors upon which it relies to justify reaching a different result in this case from that in Molloy. It applies standards of control which touch only peripheral aspects and do not go to the essence of the relationship. Testing the employment relationship by the standards we have set forth above, on the undisputed facts, precludes a finding that the long-haul drivers are independent contractors.

We acknowledge, as the majority asserts, that we do not mechanically accept "what the facts show on their face" and therefore find it necessary to probe in order to ascertain the real significance of surface "facts." We are all too familiar with the ability of the dominant party such as Santini to include in the working arrangement provisions which are no more than window dressings to accomplish a preconceived result. The right of Santini's drivers to refuse to load, which the majority cites as exemplifying our approach, illustrates this process. Although this right of refusal may create an appearance of freedom of action, its significance can only be weighed in terms of its actual operation. There is no showing of the extent of which this right was actually utilized, that it was a matter of consequence in the conduct of the long-haul moving business, or that it operated in a manner other than to permit a day off for drivers whose hours were long and irregular and whose compensation depended on the loads they delivered. Moreover, the ability to refrain from work

occasionally does not negate an employment relationship. Certainly, for example, longshoremen are no less employees because they may decide to skip the shape-up occasionally.

For all the foregoing reasons, we conclude that in all important respects the factual situation in Molloy and Santini are similar, that the Board's decisions are inconsistent, and that the long-distance drivers in both cases are employees, not independent contractors.

Dated, Washington, D.C., April 7, 1976

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX D

SUPPLEMENTAL DECISION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 74-1036

LOCAL 814, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

KARL J. LEIB, JR., INTERVENOR

No. 74-1234

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SANTINI BROTHERS, INC., RESPONDENT

On Proceedings Subsequent to Remand

Decided September 17, 1976

Before: BAZELON, Chief Judge, TAMM and ROBB, Circuit Judges

Opinion Per Curiam.

Dissenting opinion filed by Chief Judge BAZELON.

Per Curiam: In Local 814, Teamsters (Santini Brothers, Inc.), 208 N.L.R.B. 184 (1974) the National Labor Relations Board (NLRB) affirmed without comment an administrative law judge's (ALJ) decision that a provision of Local 814's collective bargaining agreement with Santini Brothers, Inc. violated sections 8(b)(4) and 8(e) of the National Labor Relations Act, 29 U.S.C. §§158(b)(4), 158(e) (1970). The effect of the contested clause is to force owner-operators of tractor trailers who contracted with Santini for long distance hauling to join Local 814 or lose their contracts. On review in this court we agreed with the Board's conclusions if the owner-operators are not "employees" within the meaning of section 2(3) of the Act, 29 U.S.C. §152(3) (1970). Local 814, Teamsters v. NLRB, 512 F.2d 564, 567 (D.C. Cir. 1975). The opinion of the ALJ adopted by the NLRB in Santini had concluded that the owner-operators were not employees within the meaning of section 2(3). However, shortly after issuing its Santini decision, the Board adopted the decision of another ALJ which concluded that owner-operators who worked for another firm in the moving and storage industry were employees. Local 814, Teamsters (Molloy Brothers Moving and Storage, Inc.), 208 N.L.R.B. 276 (1974). We therefore remanded the record of Santini to the NLRB for clarification and explanation of these

ostensibly inconsistent decisions. Local 814, Teamsters v. NLRB, supra, 512 F.2d at 567.

We now have before us the Board's Supplemental Decision in Santini wherein the NLRB has articulated the factual distinctions between its two decisions. These distinctions indicate that Molloy Brothers exercises greater control over its owner-operators than Santini Brothers and thus explain the different conclusions reached by the Board as to employee status. Having clarified the basis for its different results the Board has fully complied with this court's remand mandate. Local 814, Teamsters v. NLRB, supra, 512 F.2d at 567; see NLRB v. Silver Bay Local 962, 510 F.2d 1364 (9th Cir. 1975).

A majority of the Board found seven factual distinctions between Molloy and Santini.[1] Petitioner Local 814 attacks

1. The NLRB concluded that Santini Brothers' control over owner-operators was much less than that of Molloy Brothers based on its findings that:

1) Molloy required owner-operators to attend training classes going beyond governmental regulations whereas Santini offered but did not require a training program;

2) Molloy imposed discipline for infraction of rules beyond governmental requirements, but Santini did not;

3) Santini's owner-operators paid for their own health insurance but Molloy assumed this cost for its owner-operators;

(cont.)

these distinctions as "essentially meaningless". Petitioner's Brief at 11. Two dissenting Bcard members also question both the existence and sufficiency of differences between the cases. Local 814, Teamsters (Santini Brothers, Inc.), 223 N.L.R.B.___, ___ (No. 121, at 12-13 (1976) (Members Fanning & Jenkins, dissenting).

We must keep in mind that where, as here, an agency is charged with administering a broad statutory mandate, courts must of necessity defer to agency judgment. Local 814, Teamsters v. NLRB, supra, 512 F.2d at

1. (cont.)

4) Santini's owner-operators bear the financing costs of their trips, whereas Molloy advanced trip expenses from a reserve account of accumulated commissions and bore the risk of default by a customer;

5) Molloy established a profit sharing plan for its owner-operators, but Santini did not;

6) Santini only loaned owner-operators money to buy trucks at the start of its contracting operation, whereas Molloy made substantial loans to its owner-operators for various purposes;

7) Santini has its own Interstate Commerce Commission operating authority; Molloy does not.

Local 814, Teamsters (Santini Brothers, Inc.), 223 N.L.R.B. ___,___(No. 121, at 4-5) (1976).

572 (Bazelon, C.J., concurring in part, dissenting in part); cf. NLRB v. Food Store Employees, 417 U.S. 1,9 (1974). The remand in this case was to assure that the NLRB had in fact exercised its judgment in nearly simultaneously affirming the decisions of different administrative law judges who had reached ostensibly inconsistent conclusions. The distinctions detailed in the Board's Supplemental Decision show that the NLRB has considered the facts in each case and finds them distinguishable, thereby warranting different results. We find that the Board has exercised its judgment and engaged in reasoned analysis in arriving at the different results in Santini and Molloy.

Simply because the petitioner and two Board members do not find the NLRB's arguments persuasive does not establish that the Board has failed to apply reasoned analysis in exercising its judgment. Not all those who apply their reasoning power to a given question come to the same conclusions. The right to a "reasoned analysis" is a right to a rational, considered decision not a right to a result.

Petitioner further argues that the Board's Supplemental Decision should be rejected as mere post hoc rationalization. In Citizens to Preserve Overton Park, Inc. V. Volpe, 401 U.S. 402, 419 (1971) the Supreme Court held that post hoc rationalizations are an inadequate basis for review of agency decisions because they do not "constitute the 'whole record' compiled by the agency: the basis for review required by §706 of the Administrative Procedure Act." However, although the Court

acknowledged the danger of some post hoc rationalization, it nevertheless specifically approved the procedure of requesting an administrative body to provide additional explanation for an inadequately articulated decision. Id. at 420. The "post hoc rationalization" rule is not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning. It is a rule directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers. Thus the rule applies to rationalizations offered for the first time in litigation affidavits, Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 419, and arguments of counsel, FPC v. Texaco, 417 U.S. 380, 397 (1974); NLRB v. Food Store Employees, supra, 417 U.S. at 9.

The policy of the post hoc rationalization rule does not prohibit the NLRB from submitting an amplified articulation of the distinctions it sees between Santini and Molloy. Moreover, the logic of the rule requires it. If a reviewing court finds the record inadequate to support a finding of reasoned analysis by an agency and the court is barred from considering rationales urged by others, only the agency itself can provide the required clarification.

Having reviewed the NLRB's Supplemental Decision and petitioner's objections thereto, we conclude that the Board has sufficiently explained why the result in Santini differs from that in Molloy. We therefore approve

the Board's decision in Local 814, Teamsters (Santini Brothers, Inc.), 208 N.L.R.B. 184 (1974) and direct that it be enforced in full.

So ordered.

BAZELON, Chief Judge, dissenting: In affirming the supplemental order of the National Labor Relations Board, the majority essentially makes two points. First, it asserts the Board engaged in reasoned analysis in arriving at opposite results in Santini and Molloy. Second, it observes that the prohibition against post hoc rationalizations does not automatically preclude affirming a clarified order. I disagree with the first assertion and, although I agree with the second, fail to see its pertinence. The issue is not whether clarified administrative orders are ever sufficient, but whether this one is.

I dissented from the initial decision to remand the record for clarification. Having concluded from a variety of factors that the Board had failed to give the cases under consideration the necessary "hard look," I recommended a broader remand to enable the Board to reconsider "the doctrinal quicksand" in the entire area. 512 F.2d at 572. Secondarily, I hoped to persuade the Board to avoid the temptation of offering a sterile post hoc rationalization. Unfortunately, my hopes appear not to have been realized.

Judicial review of agency determinations is limited. Where the reasons for the agency's decision are clearly articulated,

and the decision reached is rational,[1] judicial deference is appropiate.[2] Here, even though a majority of the Board found seven factual distinctions between Molloy and Santini, there is no reasoned discussion as to why the distinctions are significant. The Board does suggest that in Molloy, unlike in Santini, there was a "layer of carrier regulation put upon the [owner-operators] beyond what was required by government regulation." (Supp. order p.3) However, the Board never explains how substantial this layer must be in order for drivers to be considered employees rather than independent contractors or, in fact, why the extra layer imposed in Molloy distinguishes that case from Santini in light of their numerous similarities. Nor does the Board attempt to justify its result in terms of the policies of the National Labor Relations Act.

Although little would be served by once again examining the facts in depth, see 512 F.2d at 568-70 (Bazelon, C.J., concurring in part, dissenting in part), a brief glance at some of the factual distinctions relied on by the Board would be

1. See, e.g. NLRB v. United Ins. Co. of American, 390 U.S. 254, 260 (1968).

2. See generally, Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-52 (1970), cert. denied 403 U.S. 923 (1971).

instructive. One distinction, for example, does not seem to be a distinction at all. The Board notes that the Molloy driver's manual lists punishments for such infractions as preventable accidents and dishonesty but that Santini has no such manual. Are we to conclude from this that Santini does not punish reckless or dishonest drivers? The significance of another distinction is not obvious. The Board observes that Santini has its own operating authority from the Interstate Commerce Commission, but that Molloy uses Allied Van Lines' certificate. But does this fact by itself establish that Molloy asserts greater control over the day-to-day activities of its drivers than Santini? Perhaps there are significant differences between Santini's and Molloy's right of control over their drivers, but the supplemental order does not show this to be the case.

In sum, I do not believe the Board's supplemental order should be affirmed. No two snowflakes are identical, but for most purposes are considered indistinguishable. Here the Board distinguishes two snowflakes without explaining in terms of the policies of the Labor Act why it has done so. Because other companies concerned about whether their drivers are employees or independent contractors will find no guidance in the Board's decisions, I would, as I said before, remand the record "for a thorough reconsideration of the doctrinal quicksand in this area." 512 F.2d at 572.

JUDGMENT
Filed November 9, 1976

Before: Bazelon, Chief Judge, Tamm and Robb, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, and representatives, and Santini Brothers, Inc., its officers, agents, successors and assigns on January 8, 1974 and upon a cross-application and an application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on January 15, 1975, and considered the briefs and transcript of record filed in this cause. On April 30, 1975, the Court being fully advised in the premises, handed down its order remanding the case to the Board for clarification. Pursuant to the Courts remand, the Board on April 7, 1976, issued its Supplemental Decision and Order, affirming its Decision and Order of January 8, 1974. Thereafter, on September 17, 1976, the Court handed down its decision granting enforcement of the Board's order, as reaffirmed.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the said order as reaffirmed, of the National Labor Relations Board in said proceeding be enforced, and that Local 814, International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America, its officers, agents and representatives and Santini Brothers, Inc., its officers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

APPENDIX E

ORDERS DENYING PETITION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 74-1036

LOCAL 814, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, ET AL.,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

KARL J. LEIB, JR., Intervenor

No. 74-1243

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

SANTINI BROTHERS, INC., Respondent

Before BAZELON, Chief Judge; TAMM and ROBB Circuit Judges.

O R D E R

On consideration of the petition for rehearing filed by petitioner-respondent Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, et al., it is

ORDERED by the Court that the aforesaid

petition for rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

FILED: JANUARY 13, 1977

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 74-1036

LOCAL 814, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, ET AL.,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

KARL J. LEIB, JR., Intervenor

No. 74-1243

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

SANTINI BROTHERS, INC.,Respondent

Before BAZELON, Chief Judge; WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges

O R D E R

The suggestion for rehearing en banc filed by petitioner-respondent Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, et al. having been transmitted to the full Court, and no Judge having requested a vote with respect

thereto, it is

ORDERED by the Court, en banc, that petitioner-respondent's aforesaid suggestion for rehearing en banc is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

FILED: JANUARY 13, 1977

APPENDIX F

STATUTES

STATUTORY PROVISIONS

National Labor Relations Act, as amended, 29 U.S.C. §151 et seq.:

Section 2(3), 29 U. S. C. §152 (3):

"Sec. 2. When used in this Act -

***

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Section 8(b)(4)(i)(ii)(A) and (B), 29 U.S.C. §158(b)(4)(i)(ii)(A) and (B):

"It shall be an unfair labor practice for a labor organization or its agents...

***

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: PROVIDED, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

Section 8(e), 29 U.S.C. §158(e):

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: PROVIDED, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: PROVIDED FURTHER, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: PROVIDED FURTHER, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1415

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner,*

—against—

NATIONAL LABOR RELATIONS BOARD, ET AL, *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT LEIB'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1415

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner*,

—against—

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents*.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT LEIB'S BRIEF IN OPPOSITION

The sole question presented by this Petition is a factual one regarding the status of the contract truckmen of Santini Bros., Inc. under the National Labor Relations Act, as amended, (hereafter generally "the Act"): (1) whether, in determining that the contract truckmen were independent contractors rather than employees, the National Labor Relations Board (hereafter generally the "Board") applied the correct legal test for gauging their status, and (2) whether the

Board's resultant determination is supported by sufficient evidence in the entire record.

These same considerations apply to the question of whether certain provisions in the labor agreement at issue before the Board were advanced and enforced by Local 814 with an unlawful secondary object of regulating the labor policies of these contract truckmen.

Review is unwarranted on the question of status because (1) in grounding its determination that Santini's contract truckmen were independent contractors the Board adhered to well-established pronouncements of this Court; (2) the several United States Courts of Appeals have unanimously approved the legal test employed by the Board in numerous review proceedings; (3) this Court has repeatedly refused to displace the role of the Courts of Appeals in the administrative review process on the issue of substantiality of the evidence; and, (4) no adequate grounds have been advanced by Petitioner entitling it to review.

Review is unwarranted on the "hot cargo" question presented by certain provisions in the labor agreement because (1) the Board again adhered to established principles for statutory construction of the Act established by this Court, and (2) Petitioner has advanced no sufficient ground entitling it to this Court's consideration.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether, after applying the common law "right of control" test and after reviewing all relevant and material factors, the Board's determination that Santini's contract truckmen are independent contractors

was supported by substantial evidence and entitled to enforcement by the Court of Appeals.

2. Whether the Board's determination that Article 24 was advanced and enforced by Local 814 with an unlawful, secondary object of regulating the labor policies of self-employed persons, Santini's contract truckmen, was likewise entitled to enforcement by the Court of Appeals.

COUNTERSTATEMENT OF THE CASE

Local 814 suggests this Court's review is required because the Board's decisions in Santini (this case) and in *Local 815, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Molloy Brothers Moving and Storage, Inc.) and Lloyd Townsend*, 208 NLRB 276, 85 L.R.R.M. 1349 (1974) (hereafter "Molloy Bros."), are essentially irreconcilable and they ask this Court to draw the conclusion that the Labor Board applied incorrect standards. That is not the case. The decisions in *Santini* and *Molloy Bros.* can readily be reconciled. Contrary to Local 814's contention, there are only two basic similarities between the administrative trial records in *Santini* and in *Molloy Bros., i.e.,* they involve the same industry and they involve the same labor organization. As recognized by the Board, and as accepted by the Court of Appeals, the cases involve different employers with vastly different employment practices. The Administrative Law Judge noted these differences; the Board noted and relied upon them and the Court of Appeals accepted that reliance.[1]

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[1] Initial Decision, Pet. App. A, at 60a, fn. 18; 223 NLRB No. 121, 91 L.R.R.M. 1543, 1544; 546 F.2d 989, 991 (D.C. Cir. 1976). Two

In view of the confusion which Local 814 engenders in this Record by its continued reliance upon *Molloy* and the dissenting opinions at the Board and in the Court of Appeals, we prefer to restate the essential facts of the *Santini* case which were relied upon by the Board and the Court of Appeals in reaching judgment.

Santini is a certificated common carrier in the moving and storage industry (E. 34).[2] It holds a certificate of Public Convenience and Necessity issued by the ICC permitting it to operate over irregular routes in some 28 states. *Id.*

In addition to its extensive warehousing of household goods and commercial moves within the several metropolitan areas in which Santini has both main and branch offices, Santini is engaged in local and long distance moving (E. 35). Local moving is classified as work within an approximate 90-100 miles radius in New York City (E. 25; 74-75). Long distance moving is classified as being in excess of 500 miles. *Id.*[3]

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members of the Board, Members Miller and Penello, participated in both the *Santini* and *Molloy Bros.* decisions. To suggest that those decisions are irreconcilable is to suggest that Members Miller and Penello were less than aware of their responsibility.

[2] "A" refers to references in the Appendix of Petitioner in the court below; "E" refers to references in the Exhibit Volumes of Petitioner in the court below; "Petition" refers to appropriate pages in Petitioner's Petition; "Pet. App." refers to appropriate pages in the Appendix to Petitioner's Petition.

[3] Local 814 does represent those employees of Santini who do local moving and warehousing. Local 814 members rarely, if ever, make trips in excess of 500 miles. Of over 1,000 such trips made in any given year, such employees may make such trips only 2 or 3 times (E. 36, 75, 80; 256-257).

Although prior to 1948, major moving and storage companies in New York had used employees to perform long distance moves, now some twenty carriers, including Santini, use contract truckmen for such work (E. 177-178; 213).

The situation now before the Court arose in 1971 and 1972, when Local 814 sought to require those contract truckmen driving long distance for Santini to join the union and sought to make Santini enforce such membership pursuant to certain contract provisions in the 1971-1974 Agreement then existing between the Moving and Storage Industry of New York (of which Santini was a member) and Local 814. Respondent Leib filed unfair labor practice charges with the Board on behalf of several contract truckmen adversely affected by such action. The proceedings before the Board and the subsequent affirmance of the Board by the Court of Appeals arise from those charges.

(a) *Santini's Branch Offices*—To accomplish both its local and long distance moving, Santini has a main office and warehouse in the Bronx, and branch offices located in Miami, Florida, and Chicago, Illinois (A. 153, 267-268)

The Miami branch office was started because the Company experienced an extremely small percentage of backhaul revenue in its trips from New York to Florida (A. 135). The Company's long distance revenue, generated by the Florida branch, indicates the small percentage of long distance backhaul revenue generated prior to the opening of the Miami branch (A. 136) For example, in 1956, the long distance backhaul revenue was a mere $6,574.00 (A. 136); by 1972

the revenue had increased to $820,000.00 (A. 136). The long distance revenue reflects backhaul tonnage from Florida to New York and tonnage emanating from Florida to other parts of the country (E. 138, 139).

From 1962 until approximately 1967, the Company operated its long distance hauling, using both contract truckmen and salaried Local 814 employees (E. 60; A. 175, 182). The gradual change to a contract truckmen type of operation was made as long distance employees became contract truckmen, retired or quit (E. 60; A. 175-176, 181-182). Not one employee driver was pressured by Santini to become a contract truckman (A. 175), and *not one* employee-driver who hauled locally during that period ever expressed a desire to haul long distance in an employee capacity (A. 181-182). Nor did any Local 814 representative ever complain that Santini's use of contract truckmen for long distance hauling deprived employee-drivers of work (A. 323).

In 1962, Santini's long distance revenue was $1,200,000 (A. 138). In 1972, the total long distance revenue was $3,608,000, representing an increase of 200 percent. Of this amount, $820,000, or approximately 22 percent, was generated in Florida (A. 135, 138). Approximately one-seventh of Santini's long distance revenue results from the booking of United Van Lines, Inc. (hereafter "United") tonnage (A. 143). Santini is one of 500 to 600 agents which book for United.

There were presently approximately 24 contract truckmen who had contracted with Santini to perform long distance hauling (A. 141). Of the 24, nine were under contract to and operated from the Company's Miami branch office (A. 141).[4] Of the 24 contract

[4] Miami is clearly outside Local 814's jurisdiction.

truckmen, six to seven were under permanent lease to, and hauled exclusively for, United (E. 160, 203; A. 150-151). Another four, based in both New York and Florida, hauled exclusively for United during the peak season—about six months of the year (A. 152).

(b) *The Contract Trucking Operation*—While becoming a contract truckman presents a unique business opportunity to the industrious and responsible driver who wants to get ahead, it takes considerable skill and initiative (E. 170-171, 207).[5]

There is no minimum income guarantee (A. 103). The truckman must generate sufficient revenue to pay for: (1) a power units which costs from $10,000 to $35,000, unless he chooses to lease from a third party; and (2) all expenses of operation, including repairs and maintenance to the power unit, tires, and tubes for the power unit, fuel, oil, lubricants, garaging, parking, scale costs, tolls, tunnels, highway use or mileage taxes, packing materials when he packs, labor, basic state license plates, meals and lodging (E. 50, 51, 52; 450-467; A. 103, 107). The contract truckman is responsible for damages to any item he hauls up to $10.00 per item, or a maximum of $100.00 per shipment (A. 105; E. 468-480). If a contract truckman or his employees has packed or unpacked a fragile item, he is responsible for the full amount of the claim unless he can demonstrate that neither he nor any of his employees were at fault (E. 450-467). For lost items, the contract truckman is fully accountable for the claim (E. 450-467).

[5] Contract truckmen generally earn more money than employee-drivers (E. 163-164).

Moreover, the contract truckman must pay for any and all telephone and other communications which he makes to Santini (E. 450-467 p. 459-460).

The contract truckman must fund a cash reserve which he may accumulate out of his generated revenue in the sum of $3,000.00 (E. 450-467; E. 74; A. 106) [6] United has calculated that a contract truckman must generate at least $200.00 per day in revenue to properly meet these many financial obligations and to make an adequate profit (A. 213-214).

The contract truckman must also keep adequate books and records, which includes the filing of the appropriate IRS forms required by an *employer* (A. 107, 110-111).

Coupled with his financial obligations, the contract truckman must organize and administer his business of packing, loading, transporting, unloading and communicating with shippers consistent with ICC and DOT regulations. Some fail (E. 207). Others succeed to the point where they purchase several power units (A. 86, 87, 97, 101).

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[6] It should be noted that a security deposit of one sort or another is not at all unusual in contracts of all types, to insure compliance by the obligor. It might be pointed out that while performing in Santini's service, a contract truckman uses a trailer owned by Santini of a very substantial value. Certainly Santini is entitled to some security in connection with the use of this equipment. Moreover, the contract truckman is chargeable for the full amount of fragile articles packed or unpacked by him or his employees or articles lost in transit. Some of these articles, such as paintings, silverware, glassware, etc., are extremely valuable, and thus Santini requires a satisfactory waiting period to assess such claims before returning the performance deposit to the contract truckman upon contract termination.

Should a driver elect to become a contract truckman, he may decide either to purchase or lease a power unit (E. 191, 192, 199; A. 78, 87). In approximately 90 percent of the cases, the contract truckman finances his unit from a third party (E. 199). In 10 percent of the cases, the units have been financed by Santini under a normal "arm's length", conditional sales type of agreement (E. 191-192, 199). The method of financing has no effect on any other facet of the relationship between Santini and the truckmen (E. 192).

The contract truckman then signs an agreement with Santini (E. 450-467).[7] This agreement provides that the equipment shall be operated under Santini's exclusive control in the *transportation, loading, unloading, and delivery* of cargo in accordance with shipping contracts and/or bills of lading relating to goods hauled under its operating authority. Control and use are restricted under the agreement to the meaning as enacted and interpreted by the ICC (E. 450-467 p. 453).[8]

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[7] The Agreement states, in part:

"22. *INTENT*

"a) It is expressly understood and agreed by, and it is the intent of the parties hereto that Contractor is an independent contractor only and neither Contractor nor its employees are employees of the Carrier. It is understood and agreed that Carrier has not the right to, and will not control or endeavor to control the manner, or prescribe the method, of doing that portion of the business of Carrier which is contracted for herein by Contractor. Contractor will be held responsible for results only." (E. 463)

The Service Agreement expresses the intent of the parties. The parties intent must be given weight. *Lorenz Schneider Co.* v. *N.L.R.B.*, 517 F.2d 445, 449-452 (2d Cir. 1975).

[8] Pertinent parts of Section 1057.4, ICC regulations, relating to equipment leasing, read:

Also, under the terms of the Service Agreement, the owner-operator is free to market his equipment and his skills to any other carrier at will upon merely giving written notice, subject only to the requirement that he complete the delivery of any cargo, the hauling of which he has undertaken (E. 450-467 p. 463).

The most common percentage arrangement contained in these agreements is 50 percent of the tariff (E. 48, 138; A. 84, 85; E. 450-467). Two contract truckmen who provide both power unit and trailer have 65 percent contracts (A. 85). Another who hauls exclusively within the State of Florida has a 55 percent contract (A. 85). Still other contract truckmen have contracted for 52½ percent during the peak summer month season (A. 85). Because trips in the 100 to 500 mile radius are relatively unprofitable, contract truckmen have negotiated trip percentages for these hauls varying from 50 to 70 percent (E. 85-87; A. 85-86).

"§ 1057.4. *Augmenting Equipment*

(a) Contract requirements. The contract, lease, or other arrangement for the use of such equipment:

• • •

(4) Exclusive possession and responsibilities. *Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement,* except: . . ." (Emphasis added.)

The ICC requires this exclusive use and control provision in order to prevent: (1) A carrier from absolving itself of its responsibility to a shipper under its operating authority; (2) One carrier from leasing equipment from another carrier and using that equipment to haul under the operating authority of the lessor, thereby expending the lessee's operating authority; and (3) a lessor-owner from hauling cargo shipped under the authority of more than one carrier on the same van. See *Tanksley Transfer Company Extension—Points in Four States*, 110 MCC 674, CCH 1970 Fed. Car. Cases, para 36,373 (1970).

Several contract truckmen have owned more than one power unit, and several of the contract truckmen are incorporated (A. 87-88, 94).

Santini's operations department, working with visual aid boards, assembles van loads by size, common destination and timing (E. 46, 84). Long distance, as opposed to local, dispatchers perform these tasks. The load is then offered to the next contract truckman available (E. 46, 52). Normally, contract truckmen are constantly on the phone with the dispatchers, advising them of their availability and inquiring about the availability of loads (E. 46, 130). Contract truckmen can and have refused loads without penalty (E. 53, 126-128; A. 115-117, 119).[9] And, in some cases, shipments are transferred from one load to another at the instance of the contract truckman (E. 127-128). However, in fairness to other available contract truckmen who are awaiting loads, the truckman who refuses a load must go to the bottom of the available truckmen's list, in most cases, before being offered another load (E. 53, 126-128; A. 115-117, 119). A contract truckman can also, without penalty, refuse loads to be delivered within the 100 to 500 mile radius, and will renegotiate his percentage upwards to 70 percent as a condition of acceptance (E. 85-87).

Before starting a trip, a contract truckman may receive, upon request, an advance against: (1) the revenue to which he is entitled on that trip and/or (2) any balance he has remaining in his account from prior trips (E. 139, 172, 195, 197). On rare occasions, the

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[9] By contrast, *Molloy Bros.* employees were suspended for refusing such trips. *Molloy Bros.*, Tr. 367 (lodged in the Court of Appeals as part of the Record in *Santini*).

advance will exceed the independent truckman's cash on hand and to be earned, in which case it comes out of *his* cash reserve. Santini does not advance any of *its* funds to independent truckmen (E. 195-197).

Before beginning his van loading, the contract truckman will first come to a Santini office and pick up a pouch containing a uniform household bill of lading, his scale ticket, and an inventory sheet (E. 107-108, 142-145). He then discusses the inventory with a shipper and obtains the shipper's signature (E. 144). The inventory, uniform bill of lading, and scale tickets are all documents which are required to be provided to the shipper by Santini, pursuant to the household goods regulations promulgated by the ICC (E. 610-629).

The contract truckman then decides how many men he will need to assist him in loading his van (E. 53-54). At that time, he alone also decides the source from which he will obtain his labor, the method of payment, the number of helpers and their hours of work, with no controls imposed on him by Santini (E. 53-54, 450-467 p. 455). The only exception to this procedure occurs when he loads or unloads within the jurisdiction of Local 814. Pursuant to Article 24 of the then current collective bargaining agreement, Local 814 has since 1971 compelled Santini to not permit the contract truckman to load or unload unless he uses Local 814 employees who are paid by the contract truckman in accordance with the terms of the collective bargaining agreement (E. 54, 56, 405-449 p. 432).

The contract truckman then proceeds to the location of the shipper and begins the loading process. The loading of the van is done entirely under his direction

and control and requires considerable skill to minimize damage and to maximize tonnage (E. 108, 450-467 p. 453). The load ordinarily is preliminarily packed prior to loading by employees of Santini (E. 106). If, however, the contract truckman must pack the shipment, he proceeds to do so. Again, the method and manner with which he proceeds to pack are his decisions alone, with no controls imposed by Santini (A. 113, 450-467 p. 453). If the contract truckman packs, he is responsible for purchasing the necessary packing supplies which he can purchase from any source (A. 103). He is solely responsible for any withholding taxes and for making appropriate social security deductions from the money paid to helpers (E. 55, 450-467 p. 454). While loading at the shipper's residence, he will establish delivery dates within a spread established by the salesman's order for service (E. 104, 121). If a customer is dissatisfied with these dates, either the contract truckman or Santini's dispatcher might change the dates after prior discussions with one another (E. 121-122). Also, while at the shipper's residence the contract truckman inquires as to how he can contact the shipper when he arrives at the destination and works out the delivery arrangements. (E. 108-109). Santini has no procedure as to how the contract truckman is to contact the shipper. The choice is his (A. 323).

Because of the nature of the household goods industry, there are no prescribed routes over which a carrier must travel. The reason for this is simply that there may be other shipments to pick up en route to the destination, which require the choice of any number of routes. Thus, to accomplish these results, the contract truckman might take a route consisting of the

best and fastest highways, or he might choose a more scenic route. The choice is his and only his to make (E. 55-56). At no time during transit is he obligated to check with or call Santini and advise it of his whereabouts (E. 55-56; A. 182).

The contract truckman also can choose as to whether and to what extent he will use a co-driver. If he chooses to fly from New York to Florida, for example, he can have his co-driver drive the unit, if he has one (E. 56-57; A. 97-98, 101, 108). Should he elect to use a co-driver, Santini, as the certificated carrier, is obligated to ensure that the co-driver meets DOT requirements (E. 131-133; A. 97-98, 108). Never has Santini failed to qualify a co-driver selected by a contract truckman (E. 132-133). The contract truckman determines the pay, hours, and all conditions of employment for his co-drivers (E. 56-57, 108, 450-467 p. 454). At his destination, he chooses the manner in which he unloads his van. He may or may not elect to hire help (E. 57-58, 450-467 pp. 454-455).

If, after the contract truckman arrives at his destination the shipper does not have the money to pay for the shipment, or if the residence is not available, the shipment may go into storage (E. 146). This is called "storage in transit" (E. 147). If the shipper fails to make payment, the contract truckman customarily discusses the situation with the Santini dispatcher, who, after these discussions, will decide the warehouse into which the shipment will be placed (E. 147-148). On occasion, the shipper will be able to come up with the payment within a short period of time after arrival. In these situations, it is solely within the contract truckman's discretion as to whether he will place the

shipment in storage or hold the shipment on his van until payment can be made (E. 148-148b; A. 109-110). Contract truckmen have waived waiting charges if it was not inconvenient for them to wait. When such charges have been waived, they have not been subject to criticism or had any penalty imposed by Santini (A. 110).

Prior to 1966, United and Santini had a 90-day inspection program. In that year, the Department of Transportation director in Kansas City advised United that the 90-day period was not sufficient, at which time United's inspection period was reduced to 60 days (A. 275-276). Having learned that the 60-day period instituted by United apparently satisfied the regular and periodical requirements of the DOT, Santini then adopted a similar program (A. 88-89).

The contract truckman and Santini each bear one-half the cost of safety inspections (E. 468-480 pp. 472-473). This inspection involves both tractor and trailer. Santini bears half the cost because it customarily owns the trailer.

According to Mr. Sclafani, Traffic Manager for the Company since 1966, at no time has the Company imposed a suspension from service on any contract truckman for any reason (E. 262-264; A. 322).[10]

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[10] Petitioner's statement that contract truckmen may be suspended or terminated when Santini or United are dissatisfied with their performance, Pet. 8, does not comport either with the record or with the Administrative Law Judge's finding, which is squarely to the contrary:

> It is significant that neither Santini nor United purport to exercise disciplinary authority over the contractors (or contractors-employees) or to invoke disciplinary penalties or reprimands; and that the only remedy available and invoked where

Santini has no rules or regulations which it has adopted for terminating contracts with contract truckmen (E. 163). Two contracts were terminated because the contract truckmen deliberately falsified their tonnage weights, in violation of ICC regulations and in breach of their agreements with Santini (E. 123, 208, 450-467 pp. 463-464). A contract was terminated because the truckman constantly got lost en route; one such occasion lasted for several days after his fully-loaded van was found unattended (E. 124, 204). On another occasion, a truckman simply "could not cut" the "finances," "responsibilities of communicating with shippers," and "all the responsibilities" that go into being a responsible businessman (E. 124, 207).

(c) *Proceedings Below.*—An Administrative Law Judge of the National Labor Relations Board, after hearing three days of testimony, Initial Decision, Pet. App. A, at 7a, concluded in an 84-page opinion that the individuals involved were independent contractors, *id.*, at 82a. A Division of the National Labor Relations Board affirmed. 208 NLRB 184, 85 L.R.R.M. 1518 (1974). On Local 814's Petition for Review, and the Board's cross-application for enforcement, the Court of Appeals, concerned by the Board's decision in *Molloy Brothers,* 208 NLRB 276, 85 L.R.R.M. 1349 (1974), remanded to the Board for clarification of the Board's position on the employee-independent contractor status of the individuals concerned. 512 F.2d 564, 567-568 (D.C. Cir. 1975). On remand, the Board

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there is dissatisfaction with contract performance (including contractor's failure to comply with government regulations, which compliance is an express obligation under the contract) is termination of the contract in Santini's case. . . ." (Pet. App. A, at 42a).

reaffirmed its judgment in this case, noting that "*Santini* is in sharp contrast to *Molloy*", that "the controls employed upon Molloy owner-operators were much greater than those exercised over the Santini drivers" and that the record in *Molloy* "show[ed] 'pervasive control' over owner-operators". 223 NLRB No. 121, 91 L.R.R.M. 1543, 1544 (1976). The Court of Appeals affirmed and ordered the decision enforced, noting that the Board had "articulated the factual distinctions between its two decisions", distinctions which "indicate that Molloy Brothers exercises greater control over its owner-operators than Santini Brothers." 546 F.2d 989, 991 (D.C. Cir. 1976). As previously indicated, members Miller and Penello participated in both the initial *Santini* and *Molloy Bros.* opinions at the Board. Local 814 brought this case here for review. Respondent submits that the Petition should be denied. What is involved here, as the Court of Appeals correctly observed, *id.*, was the resolution of factual issues and the question of whether the proper legal standard was applied thereto. As the court below held, "where, as here, an agency is charged with administering a broad statutory mandate, courts must of necessity defer to agency judgment. . . . The distinctions detailed in the Board's Supplemental Decision show that the NLRB has considered the facts in each case and finds them distinguishable, thereby warranting different results. We find that the Board has exercised its judgment and engaged in reasoned analysis in arriving at the different results in *Santini* and *Molloy.*" *Id.*

REASONS FOR DENYING THE WRIT

1. Contrary to Petitioner's Urgings the Board Took Cognizance of and Adhered to Controlling Pronouncements of This Court.

Section 2(3) of the National Labor Relations Act, as amended in 1947, 29 U.S.C. § 152(3), provides that the term "employee" shall not include ". . . any individual having the status of an independent contractor . . .". Although Congress failed to define the terms "employee" and "independent contractor", there is extensive legislative history demonstrating that the term "employee" was intended to mean someone who works for another for hire, and that the question of an individual's status as an "independent contractor" is to be determined by a common law test.

The legislative history of the 1947 amendments makes it clear that Congress specifically rejected a prior Board determination that an individual's employment status be defined in accordance with economic and social reality. This determination had been approved in *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). The House Committee Report on the 1947 Amendments reads as follows in pertinent part:

> "An 'employee', . . . means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U.S. 111 (1944), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'. H.Rpt. 245, 80th Cong., 1st Sess., Page 18, Vol. 1, *Legislative History of the Labor-Management Relations Act*, 1947, p. 309.

In *N.L.R.B.* v. *United Insurance Co. of America*, 390 U.S. 254 (1968) this Court acknowledged that Congress, in passing the 1947 amendments, intended the Board and the courts to use the common law agency test in distinguishing between employees and independent contractors.

The Administrative Law Judge correctly began his legal analysis of the independent contractor question by respecting this Court's instructions in *N.L.R.B.* v. *United Insurance Co. of America, supra.* He said:

> "The standard applied in differentiating 'employee' from 'independent contractor' under the Act is the common law agency test, *N.L.R.B.* v. *United Insurance Co. of America,* 390 U.S. 254, 256 (1968). This was made clear in the Taft-Hartley amendments (1947) of the Wagner Act. Id. Earlier, under the Wagner Act, the Board and the courts had rejected the 'power of control' concept of 'economic reality' in defining 'employee' under the *Act, N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111, 128-129 (1944), and see further explanation in *Harrison* v. *Greyvan Lines, sub nom United States* v. *Silk,* 331 U.S. 704, 713-714 (1947). Congressional reaction to this construction was adverse, and the 1947 amendment of Section 2(3) of the Act specifically excluded 'any individual having the status of independent contractor' from the definition of employee. 'The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.' *N.L.R.B.* v. *United Insurance Co., supra,* 390 U.S. at 256." Pet. App. A, at 47a-48a.

The Labor Board approved the standard adopted by Administrative Law Judge. 222 NLRB No. 121, 91 L.R.R.M. 1543, 1544. Petitioner concedes that the correct legal standard was employed by the Board. Pet. 20.

As the court below noted, petitioner's only quarrel is with the Board's result. 546 F.2d, at 991. Petitioner argues that *United Insurance Co. of America* compels

a different result. Petitioner's arguments fall both short and wide of their intended mark.

It is elementary that when applying the common law agency test and reaching a legal conclusion which is derived from an examination of all factors bearing on an employment relationship or lack thereof, no single case can be controlling on another except to the extent that the proper legal standard is utilized for the assessment of the facts involved. It was this very problem which prompted this Court to reject the common law test in *N.L.R.B.* v. *Hearst Publications, supra,* in favor of a broader test then thought more precisely designed to effectuate the policies of the then Wagner Act. In this respect, this Court stated:

> "The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as 'the test' for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has been by no means exclusively controlling in the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.
>
> * * *

". . . In short, the assumed simplicity and uniformity, resulting from application of 'common-law standards', does not exist." 322 U.S., at 120-121.

Congress rejected this Court's broad statutory considerations in *Hearst* [11] and compelled a return to the application of the common law test. Under the circumstances and recognizing the many facts which would have to be considered, it must be presumed that Congress anticipated that facially different results would be obtained in those enumerable difficult situations in which the Board is called upon to determine employment status.[12]

As the facts vary so, too, must the result. For that reason alone, the conclusion reached in *United Insurance Co. of America* could not as a matter of law be controlling on the facts here except as to the application of the proper legal standard.

It is that fact that accounts for the seemingly varying results reached on those occasions in which the Board, during the past decade, has addressed the issue of whether owner-operators are employees or indepen-

[11] Chief Judge Bazelon, dissenting in the court below, suggests that considerations of "national labor policy" should control. 512 F.2d, at 568, 570. This appears to suggest a return to the congressionally rejected *Hearst Publications* approach.

[12] "The basic standards for determining employee or independent contractor status are well settled and need not be debated. The issue in each case is the application of those standards to the facts. Our dissenting colleagues set forth at great length their reasons for disagreeing without conclusions based on those facts, but those "reasons" consist of their own comments concerning what they believe to be the situation rather than what the facts show on their face." 223 N.L.R.B. No. 121, 91 L.R.R.M., at 1545, fn. 9.

dent contractors. Respondent's research reveals that the Board has addressed that issue on at least 39 occasions in the common carrier field. In 24 of those cases, the Board determined that the contract truckmen were employees. *Cement Transport, Inc.*, 200 NLRB 841, 82 L.R.R.M. 1255 (1972), 209 NLRB 363, 86 L.R.R.M. (1976); *Maxwell Co.*, 164 NLRB 713, 65 L.R.R.M. 1210 (1967); *Steel City Transport, Inc.*, 166 NLRB 685, 65 L.R.R.M. 1614 (1967); *Crow Gravel Co.*, 168 NLRB 1040, 67 L.R.R.M. 1171 (1967); *Davis Transport, Inc.*, 180 NLRB 966, 73 L.R.R.M. 1207 (1970); *S & W Motor Lines, Inc.*, 179 NLRB No. 136, 72 L.R.R.M. 1510 (1969); *Joint Council of Teamsters 42 (J. K. Barker Trucking Co.)*, 181 NLRB 515, 76 L.R.R.M. 1764 (1970); *Deaton, Inc.*, 187 NLRB 780, 76 L.R.R.M. 1129 (1971) and 203 NLRB 1099, 83 L.R.R.M. 1294 (1973); *Ace Doran, Hauling & Rigging Co.*, 191 NLRB No. 63, 78 L.R.R.M. 1064 (1971); *Tryon Trucking, Inc.*, 192 NLRB 764, (1971); *Aetna Freight Lines, Inc.*, 194 NLRB 740, 79 L.R.R.M. 1042 (1971) and 209 NLRB 850, 85 L.R.R.M. 1614 (1974); *Florida-Texas Freight, Inc.*, 197 NLRB 976, 80 L.R.R.M. 1460 (1972); *Pony Trucking, Inc.*, 198 NLRB No. 59, 81 L.R.R.M. 1249 (1972); *Associated General Contractors of California, Inc.*, 201 NLRB 311, 82 L.R.R.M. 1242 (1973); *Land O' Lakes, Inc.*, 204 NLRB 519, 83 L.R.R.M. 1492 (1973); *Pilot Freight Carriers, Inc.*, 208 NLRB 853, 85 L.R.R.M. 1179 (1974); *Molloy Brothers Moving & Storage, Inc.*, 208 NLRB 276, 85 L.R.R.M. 1349 (1974); *Penn Trucking, Painting & Lettering Corp.*, 215 NLRB 147, 88 L.R.R.M. 1092 (1974); *John Himmer Transfer, Inc.*, 221 NLRB No. 52, 90 L.R.R.M. 1665 (1975); *St. Croix Pulpwood Co.*, 225 NLRB No. 118, 93 L.R.R.M. 1087 (1976); *Robbins Motor Transportation, Inc.*, 225 NLRB No. 99, 93 L.R.R.M. 1115 (1976);

Am Del Co., Inc., 225 NLRB No. 93, 93 L.R.R.M. 1488 (1976); and *John Warner d/b/a D. J. W. Cartage*, 227 NLRB No. 255, 94 L.R.R.M. 1414 (1977).

On the other hand, in the remaining 15 cases, the Board determined that the truckmen were independent contractors. *Sinor, L. C. and Standard Industries, Inc.*, 168 NLRB 467, 66 L.R.R.M. 1365 (1967); *Axco Mining Co., Inc.*, 169 NLRB 491, 67 L.R.R.M. 1345 (1968); *Fleet Transport Co., Inc.*, 196 NLRB 436, 80 L.R.R.M. 1047 (1972); *Conley Motor Express, Inc.*, 197 NLRB 624, 80 L.R.R.M. 1399 (1972); *Independent Rapid Trucking*, 200 NLRB 367, 82 L.R.R.M. 1169 (1972); *Portage Transfer Co., Inc.*, 204 NLRB 787, 83 L.R.R.M. 1348 (1973); *George Transfer & Rigging Co., Inc.*, 208 NLRB 494, 85 L.R.R.M. 1047 (1974); *Santini Bros, Inc., supra; Kreitz Motor Express, Inc.*, 210 NLRB 27, 86 L.R.R.M. 1217 (1974); *Daily Express, Inc.*, 211 NLRB 92, 86 L.R.R.M. 1355 (1974); *Fraley & Schilling, Inc.*, 211 NLRB 422, 87 L.R.R.M. 1378 (1974); *Ace Doran Hauling & Rigging Co., Inc.*, 214 NLRB 798, 87 L.R.R.M. 1525 (1974); *Dixie Transport Co.*, 218 NLRB 1243, 88 L.R.R.M. 1512 (1975); *Twin City Freight, Inc.*, 221 NLRB No. 205, 91 L.R.R.M. 1049 (1975); and *Perkins Motor Transport, Inc.*, 222 NLRB No. 69, 91 L.R.R.M. 1312 (1976).

Less than a dozen of the Board decisions on the employment versus independent contractor status of owner-operators in the common carrier field have reached the Courts of Appeals. In each instance, however, irrespective of whether the Board found employment status or independent contractor status, the Court of Appeals, once having determined that the proper legal test was applied, affirmed the Board's conclusions. This demonstrates as clearly as anything can the fact

that such decisions primarily turn on the facts of each case. The strictures imposed by the review provisions of the Administrative Procedures Act, 5 U.S.C. § 706, and due deference to the principles enunciated in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951), mandate that result. See, by way of illustration, *Maxwell Co.* v. *NLRB*, 414 F.2d 477 (6th Cir. 1969); *NLRB* v. *Davis Transport, Inc.*, 433 F.2d 363 (6th Cir. 1970); *Joint Council of Teamsters No. 42* v. *NLRB*, 450 F.2d 1322 (D.C. Cir. 1971); *Ace Doran Hauling & Rigging Co.* v. *NLRB*, 462 F.2d 190 (6th Cir. 1972); *NLRB* v. *Pony Trucking, Inc.*, 486 F.2d 1039 (6th Cir. 1973); *NLRB* v. *Cement Transport Co.*, 490 F.2d 1024 (6th Cir. 1974); *NLRB* v. *Deaton, Inc.*, 502 F.2d 1221 (5th Cir. 1975); *Aetna Freight Lines, Inc.* v. *NLRB*, 520 F.2d 928 (6th Cir. 1975); and *Teamsters, Local 814 (Santini Bros., Inc.)* v. *NLRB, supra.*

2. The Universal Camera Standard for Judicial Review of Agency Determinations Was Not Met

The standard for review of findings of the Board was established in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1954), in which it was held that the Board's findings should not be overturned unless the reviewing court can conscientiously find that there is a lack of substantial evidence to support the Board's findings after consideration of the record as a whole, including the Administrative Law Judge's decision. The Board's findings are conclusive if supported by substantial evidence. *NLRB* v. *Walton*, 322 F.2d 187 (5th Cir. 1963); 5 U.S.C. § 706.

While the determination of employee versus independent contractor status involves no special adminis-

trative expertise which courts do not possess, *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 260 (1968), this does not authorize reviewing courts to displace the Board's choice between two fairly conflicting views, even though the court would have made a different choice had the matter been before it *de novo*. *Universal Camera Corp.*, supra at 488.

Despite the fact that the Administrative Law Judge who originally determined that Santini's contract truckmen were independent contractors had demonstrated an awareness of and took into consideration the different result reached by the Administrative Law Judge in *Molloy Bros.*, Pet. App. A, at 60a-61a, fn. 181 and further despite the fact that *Santini* and *Molloy* cases were unanimously decided by three member panels of the Board, two members of which served on both panels, the Court below initially remanded this case to the Board to clarify the different results reached in *Santini* and *Molloy*. 512 F.2d at 567-568. Rather than returning the case to a three member panel, the Labor Board submitted the record to the complete Board. A three member majority carefully, but flatly, concluded that the *Santini* and *Molloy* cases were sufficiently factually dissimilar so as to compel different results. 223 NLRB No. 121, 91 L.R.L.M. 1543-1544. The majority of the Board then listed seven factual distinctions which it considered sufficiently controlling. *Id.*

The reviewing court below considered the Board's action on remand, noted the factual distinctions which the Board had drawn between *Santini* and *Molloy Bros.*, 546 F.2d, at 991, fn. 1, and was satisfied that the Board had engaged in sufficient reasoned analysis to justify arriving at different results in the two cases.

In this respect the court said:

> "The remand in this case was to assure that the NLRB had in fact exercised its judgment in nearly simultaneously affirming the decisions of different administrative law judges who had reached ostensibly inconsistent conclusions. The distinctions detailed in the Board's Supplemental Decision show that the NLRB has considered the facts in each case and finds them distinguishable, thereby warranting different results. We find that the Board has exercised its judgment and engaged in reasoned analysis in arriving at the different results in *Santini* and *Molloy*.
>
> "Simply because the petitioner and two Board members do not find the NLRB's arguments persuasive does not establish that the Board has failed to apply reasoned analysis in exercising its judgment. Not all those who apply their reasoning power to a given question come to the same conclusions. The right to a 'reasoned analysis' is a right to a rational, considered decision not a right to a result." 546 F.2d, at 991.

3. This Court's Rule of Non-Interference Equally Compels a Denial of the Petition.

In *NLRB* v. *Pittsburgh S.S. Company*, 340 U.S. 498 (1951), this Court adopted a rule of non-interference in substantiality of evidence cases, choosing to leave undisturbed a conclusion of a Court of Appeals even though this Court might have decided the matter differently were the case before it in the first instance.

This Court stressed:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and

not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. "The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari. . . ." Taft-Hartley Act, § 10 (e), 61 Stat. 148, 29 U.S.C. (Supp. III) § 160 (e). Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393; Revised Rules of the Supreme Court of the United States, Rule 38 (5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." 340 U.S., at 502-503.

This Court's rule of non-interference was recently followed in *South Prairie Const. Co.* v. *Engineers,* 425 U.S. 800 (1976), on the issue of whether a company was a single employer. Stripped to their essence, Petitioner's arguments in support of review on the employer-independent contractor issue are mere variations through which it is urging this Court to re-review a legal conclusion inextricably entwined with the substantiality of the evidence. Congress has chosen to have this issue decided in the manner used by the Board and a Court of Appeals has fulfilled its judicial review responsibilities. Simply put, no further action is necessary to effectuate the administration of the Act.

4. The Board and the Court Below Correctly Decided the § 8(e) Question

In *National Woodwork Manufacturer's Association* v. *NLRB,* 386 U.S. 612 (1967), this Court held that Section 8(e) must be read in the light of all surrounding circumstances to determine if a union's objective is to preserve work for bargaining unit employees, or if its efforts are calculated to satisfy other union objectives.

In a footnote, this Court instructed that as a general proposition such circumstances might include: (1) "the remoteness of the threat of displacement by the . . . services;" (2) "the history of labor relations between the union and the employers who would be boycotted;" and (3) "the economic personality of the industry." 386 U.S., at 644, fn. 38.

In assessing these factors, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." 386 U.S., at 646.

While Local 814 claims that Article 24 is designed only to maintain or regain unit work, obviously such a claim cannot be supported when, in fact: (1) independent truckmen contracted to Santini do not perform local work, find it undesirable economically to haul in the 100 to 500 mile radius, and assist in commercial work only when unit employees are insufficient (E. 150-153); (2) no Santini bargaining unit employee-driver has performed long distance hauling in excess of 500 miles since 1967, with the rare exception of two or three trips each year; (3) from 1967 to 1973, not one Santini bargaining unit employee-driver requested that long distance hauling in excess of 500 miles be assigned to him; (4) Local 814 has not made one request of Santini that any bargaining unit employee-driver perform long distance hauling; and (5) there is a critical shortage of employee-drivers in the New York moving and storage industry.

Moreover, the number of drivers in the Santini bargaining unit has remained intact. There simply has not been, and there currently is, no displacement threat posed either to the industry bargaining unit or to the Santini bargaining unit by the long distance operation.

From 1948 until 1971, Local 814 was aware of the industry's use of contract truckmen and did nothing other than to condone this practice in the 1962, 1965 and 1968 agreements. Not until 1968 did it begin, for the first time, to insist that the contract truckmen become union members.

At no time during the 1968 and 1971 negotiations did Local 814 insist, or even request, that bargaining unit employees displace contract truckmen in performing long distance work. There is no evidence that a

single grievance has been filed during this entire 25-year period objecting to the use of contract truckmen. And not once has Local 814 relied on the subcontracting clause (Article 23, 1971 Agreement, E, 431) to contest the contract truckman method of operation, even though that clause has the stated purpose of preserving unit work.

Plainly and simply, what Local 814 is asserting is that Santini's contract truckmen, who were and are independent contractors and outside the definition of employee in Section 2(3), must become Union members. Article 24 is nothing more than a union signatory clause.

The union signatory requirements of Article 24 are not directed to the return of work, but simply to the acquisition of additional union members at the expense of a cessation of business in the event the contract truckmen refuse to join the Union. Granted, a union has an institutional interest in obtaining new members; but when that interest extends beyond the legitimate, primary confines of the bargaining unit, it becomes unlawful secondary activity. *A. Duie Pyle, Inc.* v. *NLRB (Highway Truck Drivers, etc., Local 107, etc., McCormick, Inc., et al)* 383 F.2d 772 (3rd Cir. 1967); *NLRB* v. *Joint Council of Teamsters No. 38,* 338 F.2d (9th Cir. 1964); *Meat & Highway Drivers, Dockmen, Helpers & Misc. Truck Terminal Employ-*of a cessation of business in the event the contract *ees, Local Union No. 710, etc.* v. *NLRB,* 335 F.2d 709 (1964); *District No. 9, International Association of Machinists* v. *NLRB,* 315 F.2d 33 (1962); *E. A. Gallagher,* 131 NLRB 925 (1961) enf'd, 302 F.2d 897 (D.C. Cir. 1962); *Teamsters Local 66 (Carnation Co.)* 181 NLRB 141 (1970); *San Francisco Newspaper Printing Co.,* 204 NLRB No. 60 (1973).

The secondary impact in this case is substantial. Contract truckmen have had their internal labor relations established against their wishes at the risk of the termination of their contracts and the loss of their business opportunities with Santini.

So drastic is the secondary effect under this arrangement that the Board was compelled recently to hold that such union signatory clauses would be considered unlawful on their face unless the union could come forward with sufficient legitimate primary objectives. *San Francisco Newspaper Printing Co.*, supra. In *San Francisco Newspaper*, the Board said that such contract terminations must be incidental to the accomplishment of an objective relating to the terms and conditions of employment of employees in the bargaining unit.

For all that appears from the Petition, Local 814's Section 8(e) argument is an afterthought. Each of the administrative and judicial bodies below agreed that the Section 8(e) decision was governed by the more basic decision as to whether the individuals concerned were independent contractors or employees. Pet. App. A, 65a-78a; 208 NLRB 184, 85 L.R.R.M. 1518 (1974). And, in this case, a *unanimous* Court of Appeals has agreed. 512 F.2d 564, 568. Local 814 does not suggest that either the Board or the Court applied an improper test. Again, Local 814 simply finds fault with the result, an insufficient basis to insist upon this Court's discretionary review power.

CONCLUSION

This case presents a purely factual dispute—whether the owner-operators who drive long distance

hauls for Santini Bros., Inc. are employees within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3) or whether they are independent contractors. If employees, the conduct of Local 814 may be judged by one standard; if independent contractors, by another. Every other question posed in the Petition is subsidiary to, and the answer follows from the answer to, whether the persons here involved are employees or independent contractors. Thus, whether Local 814 violated Section 8(e) of the Act, 29 U.S.C. 158(e) or whether it violated Section 8(b)(4), 29 U.S.C. § 158(b)(4), depends almost completely upon the status of the individuals involved—employes or independent contractors.

Throughout the whole process to date, there has been a uniform answer to that question. The Administrative Law Judge, in an 84-page opinion, Pet. App. A, 2a-86a; a Division of the National Labor Relations Board, 208 NLRB 184, 85 L.R.R.M. 1518 (1974); a majority of the full Board, 223 NLRB No. 121, 91 L.R.R.M. 1543 (1976); and a majority of the United States Court of Appeals for the District of Columbia Circuit, 512 F.2d 564 (D.C. Cir. 1975) and 546 F.2d 989 (D.C. Cir. 1976), have all provided the same answer to this factual question—they are independent contractors.[13]

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[13] In addition, the Regional Director of the Board's Region 2, who sought an injunction against Local 814 under Section 10(1) of the Act, 29 U.S.C. § 160(1), and the United States District Court Judge who issued the injunction, *Danielson* v. *Local 814 Teamsters*, 355 F.Supp. 1293 (S.D.N.Y. 1973), so found, at least impliedly. Sitting in the District Court, Judge Ward specifically concluded that ". . . certainly a 'reasonable probability' exists that the Board will find that the owner-operators are independent contractors". 355 F.Supp., at 1298.

Local 814, dissatisfied with that result, now asks this Court to enter into this essentially factual dispute. But this Court does not sit to resolve factual questions. *United States* v. *Johnson,* 286 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

This case presents the classic confluence of the rationale behind the "two court rule", *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275 (1948);[14] *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1966)[15] and the intendment of the Administrative Procedures Act to give a *prima facie* effect to the findings of an administrative agency, especially when such findings have been approved by a reviewing court. See 5 U.S.C. § 706; and see *Hamilton and Dayton Railway Co.* v. *Interstate Commerce Commission,* 206 U.S. 142, 154 (1907);[16] *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491 (1951).[17] The factual findings in this case have been made by the

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[14] "A court of law, such as this Court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

[15] ". . . this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below . . .' ."

[16] "The statute given *prima facie* effect to the findings of the Commission, and when those findings are concurred in by the Circuit Court, we think they should not be interfered with, unless the record establishes that clear and unmistakable error has been committed."

[17] And, see *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 357-358 (1939); *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U.S. 72, 75 (1940).

Administrative Law Judge, twice approved by the National Labor Relations Board and, finally, approved by the Court of Appeals. There is no basis for their review here and the Petition should forthwith be denied.

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No. 76-1415

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 2 2

Section 8 2

Section 8(b)(4) 4, 13, 14

Section 8(b)(4)(A) 8

Section 8(b)(4)(B) 8

Section 8(e) 4, 7, 8, 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1415

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1d-9d) is reported at 546 F. 2d 989. The supplemental decision and order of the National Labor Relations Board (Pet. App. 1c-19c) are reported at 223 NLRB 752. The court of appeals' earlier decision remanding to the Board for clarification (Pet. App. 1b-24b) is reported at 512 F. 2d 564. The Board's original decision and order (Pet. App. 1a-86a) are reported at 208 NLRB 184.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10d-11d) was entered on November 9, 1976, and petitioner's

timely petition for rehearing was denied on January 13, 1977 (Pet. App. 1e-2e). The petition for a writ of certiorari was filed on April 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the owner-operators of moving vans under contract with a moving company are independent contractors, rather than employees of the company.

2. Whether substantial evidence supports the Board's findings that the union violated the secondary boycott provisions of the National Labor Relations Act by attempting to enforce an agreement requiring the moving company to cease doing business with the owner-operators unless they became members of the union.

STATUTE INVOLVED

The relevant provisions of Sections 2 and 8 of the National Labor Relations Act, as amended, 29 U.S.C. 152 and 158 (61 Stat. 137, 140, 73 Stat. 525, 542), are set forth in the appendix to the petition, pp. 1f-3f.

STATEMENT

A. Initial Proceedings

1. Santini Brothers., Inc. ("the Company" or "Santini") engages in local and long distance moving of household goods and office equipment. For its local operations, Santini uses its own moving vans and employs drivers who are represented by petitioner (herein "the Union") (Pet. App. 3a). For long distance moving, Santini has, since 1962, contracted individually with a number of

owner-operators,[1] who load, haul, and unload the shipments from point of origin to destination for a percentage of the moving charges, which are established by the Interstate Commerce Commission (Pet. App. 3a-10a).

Pursuant to Article 24[2] of its 1971-1974 collective agreement with Santini (Pet. App. 22a-24a), the Union insisted

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[1]Owner-operators own their own tractors or power units, but, with few exceptions, the Company supplies the trailers. Most owner-operators drive their own tractors, but some employ drivers in carrying out their contracts with the Company (Pet. App. 29a-30a).

[2]As described by the Administrative Law Judge (Pet. App. 65a-66a). Article 24 provides:

> that any person doing long distance driving under contract with an employer covered by the union contract, whether as owner-operator or commission driver or otherwise, shall be covered by the union contract as an employee, called contract employee. However, it is further provided that, except for the specific provisions of the article, the details of economic and other arrangements between the contract employees and the employer shall be the subject of the individual contracts between them.
>
> The specific provisions of article 24 make applicable to the contract employees the union security, union checkoff, pension and welfare, no-strike, grievance and arbitration, and separability clauses of the union contract. However, the employer is to compensate the contract employees under a "separate check" system and is to provide them social security, workmen's compensation, and unemployment insurance benefits under the separate compensation system. There is reserved for the employer the right, consistent with its agency van line agreement, to control the manner of performance of contract employees, and to assign work in a way that attempts to reconcile equal earnings opportunity with seniority, qualifications, equipment capabilities, and agency van line agreement. First-in-first-out dispatch is stipulated not to be a violation of equal earning opportunity. Lastly it is provided that the agreement (under the article) shall not be used to deplete the number of regular long distance employees, as distinguished from contract employees, presently employed by covered employers.

on enforcement of the union security provision requiring owner-operators to become and remain union members. The Union struck to enforce its demand and Santini required the owner-operators to join the Union as a condition to loading in New York (Santini's principal place of business). Thereupon, unfair labor practice charges were filed by certain of the owner-operators. (Pet. App. 3a-4a.) Rejecting the Union's contention that the owner-operators were employees under the Act, the Board found that they were independent contractors and that the Union's attempts to require their union membership as a condition of doing business with the Company violated Section 8(b)(4) and 8(e) of the Act (Pet. App. 82a).

2. The Board's findings are based on the following facts.

The owner-operators are required by applicable Department of Transportation regulations to reserve their tractors for Santini's[3] exclusive use. However, they may without penalty refuse to accept offered loads and may hire drivers to operate their equipment leased to Santini (Pet. App. 30a-31a and n. 14, 62a).

After a shipper requests Santini's services, Santini employees estimate the cost of the move and set the pickup date (Pet. App. 33a-35a). However, after the owner-operator accepts a given order, he has full responsibility for the operation. He hires and supervises his own employees, both at the point of origin and delivery, to assist in packing, loading, unloading and over-the-road driving.[4] (Pet. App. 35a-36a.) The owner-operator selects his own routes for delivery, sets the work hours for himself and his helpers, and bears the expenses incident to the job, such as packing materials, fuel, weighing, tolls, and overnight accommodations (Pet. App. 36a-37a, 39a, 63a). The owner-operator pays his own helpers, is responsible for withholding their social security and income taxes, and provides liability insurance and workmen's compensation for them (Pet. App. 38a). He also is responsible for costs due to damage or loss of household goods which he transports (Pet. App. 62a).

[3]Santini operates under a franchise arrangement with United Van Lines, a nationwide operator, in states where Santini does not have requisite authority to operate (Pet. App. 13a-14a). Except where otherwise noted, the description herein applies to both companies' method of operation.

The owner-operators receive a percentage of the contract price, usually 50 percent (Pet. App. 31a-32a). They have no minimum income guarantee and receive no other form of compensation (Pet. App. 33a). Unlike Santini's local drivers, they receive no social security, workmen's compensation, retirement, or any other type of employee benefit from the Company (Pet. App. 38a-39a). The owner-operators bear the maintenance and repair costs for the trailers owned by them, the cost of garaging, and road use taxes (*ibid.*).

Santini provides no supervision of the owner-operators beyond the requirements imposed by the Interstate Commerce Commission and the Department of Transportation (Pet. App. 61a, n. 18).[5] It exercises no disciplinary control over the owner-operators; no suspensions are imposed. Termination of the contract is the sole recourse

[4]The owner-operators may hire loading helpers from any available source, except that in New York, because of its contract with the Union, Santini requires them to select helpers from Santini's roster (Pet. App. 35a).

[5]Government regulations, for example, require periodic inspection of equipment, limited driving hours, and daily logs and accident reports (Pet. App. 36a, 40a-42a).

for violation of applicable regulations.[6] (Pet. App. 42a-43a.)

3. In concluding that the owner-operators were independent contractors rather than employees, the Administrative Law Judge, whose decision was adopted by the Board, stated (Pet. App. 47a):

> Central to this conclusion is the net total of the evidence that each of the contractors has within his own control the means of performing the contracted moving services and the method of performance, unsupervised in execution by the carrier whose business he performs. The restrictions upon him are largely those imposed by law on the governmentally regulated business of moving household goods by motor carrier, both with regard to consumer protection and highway safety.

He pointed out, citing *Local 814, International Brotherhood of Teamsters (Molloy Brothers Moving and Storage, Inc.)*, 208 NLRB 276 (see also discussion *infra*, pp. 9-10), that, in cases where the Board has found owner-operators to be statutory employees, there has existed "a layer of carrier regulations put upon the contractor beyond what was required by government regulations, impairing the contractor's independence" (Pet. App. 60a-61a, n. 18).

The Administrative Law Judge also found that (Pet. App. 62a):

> [T]he Santini contractors have all of the entrepreneurial indicia of investment in the ownership of expensive power units, in some cases multiple units

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[6]United conducts an optional "refresher" training program for its permanent lease drivers and publishes a manual which employees are free to use as they see fit (Pet. App. 45a-46a, 64a).

> and ownership of trailers as well, and shoulder all of the costs and arrangements of their operation and maintenance and the risks and costs of damage, including loss or breakage of the household goods in their care.

Turning to the contention that the requirement that the owner-operators be required to join the Union violated Section 8(e) of the Act, the Administrative Law Judge stated (Pet. App. 66a-67a):

> The inquiry, then is whether the object of the Union's conduct and of the agreement respecting the contract drivers (article 24) was "primary"—intended to preserve fairly claimable unit work to unit members in the employ of the contracting employer—or "secondary"—aimed at regulating the labor policies of other employers including self-employed persons. If the object was primary, the agreement did not violate Section 8(e) of the Act, even if its incidental effect caused the employer to cease doing business with other persons; whereas if the purpose was secondary, such as limiting subcontracting to employers who recognize the union or who are signatory to a contract with it or who are members of it, the agreement was unlawful and a violation of Section 8(e) * * *.

The Administrative Law Judge found that the Union's object in Article 24 was not to recapture lost work for bargaining unit employees, as the Union contended, but was to further the Union's institutional interests in acquiring new members. Thus, he pointed out (Pet. App. 72a-73a):

> [A]part from talk by a union lawyer at the Industry-Union negotiation about seeking to recapture bargaining unit work, * * * for a number of years (since

at least 1967) there has been no body of bargaining unit employees, including Santini employees, who have performed long distance moving or for whom to preserve or recapture the long distance household moving business. As developed by the record of this case, the plain fact is that in New York City, at least, the moving business has undergone several gradual changes over a period of years and, among these, has turned for long distance performance to a new breed of small independent businessmen, frequently not based in New York, and capable and willing to move constantly about the country with their own power units. The New York City Industry bargaining unit employees have apparently adjusted to the changes without economic loss, acquiring increased local work (and possibly more desirable work than long distance hauling from the standpoint of a local employee).

Therefore, the Administrative Law Judge concluded that Article 24 violates Section 8(e) of the Act (Pet. App. 77a) by requiring the employer to cease doing business with non-union owner-operators. He further concluded that the Union's attempts to secure compliance with Article 24 through strike pressure and threats of such pressure violated Section 8(b)(4)(A) and (B) of the Act (Pet. App. 81a-82a).

4. The court of appeals agreed with the Board that, if the owner-operators were independent contractors, Article 24 is "clearly a union signatory agreement violative of sections 8(b)(4) and 8(e)" (Pet. App. 6b). The court stated (Pet. App. 5b-6b):

> [The Union] contends * * * that * * * Article 24 is a legitimate work preservation clause. We cannot agree. As written, Article 24 neither establishes union work standards for the subcontracting of work nor requires that specific work be done by members of the bargaining unit. Rather, Article 24 purports to require the owner-operators to join the union by defining them as "employees," and hence subjecting them to the union security agreement.

However, the court remanded the case to the Board for clarification of why it had reached a different result here than in *Molloy, supra,* where the Board had found owner-operators of another employer in the same bargaining unit to be employees (Pet. App. 8b).[7]

B. Proceedings After Remand

On remand, the Board (Members Fanning and Jenkins dissenting) affirmed its prior decision. It noted that the Board "has often stated that it will apply the right-of-control test and in doing so will take into account all the factors bearing on [the owner-operators'] status" (Pet. App. 3c). "The basic standards for determining employee * * * status are well settled and need not be debated" (Pet. App. 7c, n. 9).

The Board held that the Administrative Law Judge had correctly found that *Molloy* was distinguishable from *Santini* in that "there was a layer of carrier regulation put upon the (owner-operators) beyond what was required by governmental regulation, impairing the (owner-operators') independence" (Pet. App. 4c-5c; see

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[7] Chief Judge Bazelon, although agreeing that Article 24 was a union signatory clause, disagreed with the scope of the remand. He would have mandated a thorough explication of the standards applicable to determining employee or independent contractor status under the Act (Pet. App. 9b-24b).

supra, p. 6).[8] Thus, Molloy had mandatory training programs and working procedures that had no counterpart in Department of Transportation regulations; employees were supervised in loading and unloading and disciplined for failing to follow procedures; Molloy required drivers to check in with its affiliate dispatcher at their destination; and it did not allow drivers to refuse loads (Pet. App. 5c-6c).

The Board also found that Santini's owner-operators assumed greater entrepreneurial risk than did those of Molloy in that 1) Santini's owner-operators themselves pay for any health insurance they may carry, whereas Molloy assumed the costs of health insurance for the owners; 2) the owner-operators contracting with Santini bear the costs and incidents of operation and the Company does not advance trip expenses, whereas Molloy alone bears the risk of any default by a customer in payments for services rendered by owner-drivers, and it advances trip expenses from a reserve account accumulated from the owner-operators' commissions; 3) Molloy established a profit-sharing plan for the owners, while Santini has no similar arrangement; and 4) only when Santini converted to the contracting method of long-distance moving did it loan the operators money to buy trucks, and these loans were paid off by 1973, while Molloy has made loans to owners in substantial amounts for various purposes (Pet. App. 6c).

The court of appeals (Chief Judge Bazelon dissenting) upheld the Board's supplemental decision, noting that the

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[8]As the Board stated in *Molloy*, there was "pervasive control over the [owner-operators'] mode of operation, particularly their on-the-job training, their procedures in loading and unloading cargo, their dealings with customers, and * * * such control exceed[ed] governmental requirements to a significant degree." 208 NLRB at 279.

Board's articulation of the factual distinctions between its two decisions showed that Molloy Brothers exercises greater control over its owner-operators than Santini Brothers (Pet. App. 3d).

It ordered enforcement of the Board's decision and order, after holding that (Pet. App. 5d):

> The distinctions detailed in the Board's Supplemental Decision show that the NLRB has considered the facts in each case and finds them distinguishable, thereby warranting different results. We find that the Board has exercised its judgment and engaged in reasoned analysis in arriving at the different results in *Santini* and *Molloy*.

ARGUMENT

1. Petitioner contends that the present decision conflicts with the Board's decision in *Molloy, supra* (Pet. 24-25) and that "looking at the essence of the relationship" the owner-operators clearly are employees of Santini (Pet. 17). Petitioner argues that even if the present case and *Molloy* differ in some respects, the distinctions upon which the Board relied in deciding these cases differently were not adequately "explain[ed] in terms of the policies of the Labor Act" (Pet. 25, 27).

This Court established in *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 256, that common-law agency principles are to be used in distinguishing between employees and independent contractors under the Act. It noted that "independence" and "initiative and decision-making authority * * * [are] normally associated with an independent contractor" (*id.* at 258). It cautioned, however, that "[t]here are innumerable situations * * * where it is difficult to say whether a particular individual is an employee or an independent

contractor" and that in such cases "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive" (*ibid.*).

Following the direction in *United Insurance*,[9] the Board assessed and weighed the incidents of the relationship between the owner-operators and Santini, applying common-law principles. It concluded, primarily on the basis of the absence of supervision or control by Santini over the owner-operators' methods of operation, other than those required by government regulation (Pet. App. 47a), and the entrepreneurial character of their operations (Pet. App. 62a), that the owner-operators were independent contractors. Applying these same standards—the existence of carrier regulation beyond what is required by government regulation (Pet. App. 60a-61a, n. 18; 4c-6c) and entrepreneurial risk (Pet. App. 6c)—the Board determined

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[9]Contrary to petitioner's contention (Pet. 21-23), the Board's decision here does not conflict with *United Insurance, supra*. There the debit agents, who were held to be employees by the Court, were under constant supervision in virtually every aspect of their jobs; their basic "tool"—a debit book listing policyholders—was owned by the employer; they received bonuses, benefits, vacations, group insurance, and profit-sharing, none of which is received by Santini's owner-operators; and the agents were subject to reprimands, discipline, and discharge (390 U.S. at 257-259).

The Court found the following statement made by the chairman of the board of United Insurance the "best summation of what these factors mean": "'if any agent believes he has the power to make his own rules and plan of handling the Company's business then that agent should hand in his resignation at once'." (*id.* at 259). No similar rigid requirement to follow company rules and plans—other than those required by federal law—exists in this case.

that the owner-operators in *Molloy*, by contrast, were employees.[10]

This Court, in *United Insurance, supra*, articulated the standard for review of the Board's determinations as to independent contractor status. That determination (390 U.S. at 260) "should not be set aside just because a court would, as an original matter, decide the case the other way"; rather, "the Board's choice between two fairly conflicting views" should be sustained. The court of appeals, applying this standard of review, held (Pet. App. 5d) that the Board in this case had exercised its judgment and engaged in a "reasoned analysis" in distinguishing between *Molloy* and *Santini*, and in concluding that the owner-operators in the present case are independent contractors.

Plainly, this issue does not warrant further review by this Court, since it presents only the essentially factual question whether the Board correctly determined that the owner-operators in the present case, unlike those in *Molloy*, are independent contractors.

2. Petitioner also contends (Pet. 28-30) that the court below erred in finding that Article 24 of the collective bargaining agreement was a union signatory agreement in violation of Section 8(b)(4) and 8(e) of the Act.

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[10]Petitioner also asserts (Pet. 25-27) that the Board's opinion conflicts with prior Board decisions other than *Molloy*. In *Ace Doran Hauling & Rigging Co.* v. *National Labor Relations Board*, 462 F. 2d 190 (C.A. 6), enforcing 191 NLRB 428, however, the carrier conducted road checks, required inspections every 30 days, controlled the drivers' routes in some instances, terminated leases if the operators declined loads for a period of time, and disciplined or discharged drivers for accidents or violations of I.C.C. rules (462 F. 2d at 192). Similarly, in the other cases cited (Pet. 27), there was, as the court noted in *National Labor Relations Board* v. *Deaton, Inc.*, 502 F. 2d 1221, 1226 (C.A. 5), certiorari denied, 422 U.S. 1047, substantial evidence of "additional controls" beyond those which are "federally-mandated."

In *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612, 644, this Court held that the determination whether an agreement restricting business relations between two persons violates Section 8(e) of the Act turns on "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the unit] employees, or whether the agreements * * * were tactically calculated to satisfy union objectives elsewhere" (footnote omitted). See also *National Labor Relations Board* v. *Enterprise Association of Pipefitters*, 429 U.S. 507. If the agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful. As the court below stated in its initial opinion, agreements which require "that specific work be done by members of the bargaining unit" or only in accordance with "union work standards" are primary, but those which restrict work opportunities to union members are secondary (Pet. App. 6b). See also *National Labor Relations Board* v. *National Maritime Union of America, AFL-CIO*, 486 F. 2d 907, 913, 914 (C.A. 2), certiorari denied, 416 U.S. 970.

Petitioner's objection to the Board's findings of violations of Section 8(b)(4) and 8(e) presents only the question whether the Board properly concluded that the prinicipal thrust of the contract provision was to expand the Union's membership rather than to preserve work opportunities for the unit members. That issue, which involves only the application of settled principles to particular facts, does not warrant review by this Court. In any event, the circumstances relied on by the Board fully support its conclusion that Article 24 had an unlawful

secondary objective.[11] As the Board found, there have been no bargaining unit employees, including Santini employees, who have performed long distance moving for a number of years. Accordingly, there were no employees for whom to preserve or recapture the long-distance household moving business, and the effect of the clause was therefore to expand union membership.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1977.

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[11]Contrary to petitioner's contention (Pet. 29), the Board has accepted the Third Circuit's views in *A. Duie Pyle, Inc.* v. *National Labor Relations Board*, 383 F. 2d 772, certiorari denied, 390 U.S. 905, which support the finding in this case. In addition to the instant case (Pet. App. 73a-76a, 6b), see, *e.g.*, *Newspaper & Periodical Drivers & Helpers Union, Local 921, Teamsters*, 204 NLRB 440, 441, enforced, 509 F. 2d 99, 100 (C.A. 9), certiorari denied, 423 U.S. 831.

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